No. 89-7024-CFH
Status: GRANTED
CAPITAL CASE

Docketed:
March 23, 1990

Title: Warren McCleskey, Petitioner
v.
Walter D. Zant, Superintendent, Georgia Diagnostic & Classification Center

Court: United States Court of Appeals for the Eleventh Circuit

Counsel for petitioner: Boger,John Charles

Counsel for respondent: Westmoreland,Mary Beth

Entry	Date	Note	Proceedings and Orders
1	Mar 23 1990	G	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
3	Apr 23 1990		Brief amici curiae of Alabama Capital Representation Center, et al. filed.
4	Apr 27 1990		Brief of respondent Zant in opposition filed.
5	May 3 1990		DISTRIBUTED. May 17, 1990
7	May 18 1990		REDISTRIBUTED. May 24, 1990
9	May 25 1990		REDISTRIBUTED. May 31, 1990
11	Jun 4 1990		Petition GRANTED. In addition to the questions presented by the petition the parties are requested to brief and argue the following question: "Must the State demonstrate that a claim was deliberately abandoned in an earlier petition for a writ of habeas corpus in order to establish that inclusion of that claim in a subsequent habeas petition constitutes abuse of the writ?"
			**********
15	Jun 22 1990		Joint appendix filed.
13	Jul 11 1990		Order extending time to file brief of petitioner on the merits until July 30, 1990.
16	Jul 30 1990		Brief of petitioner McCleskey filed.
18	Jul 30 1990		Brief amici curiae of Alabama Capital Representation, et al. filed.
17	Aug 3 1990	G	Application (A90-96) by Warren McCleskey to file a brief on the merits in excess of page limits, submitted to Justice Kennedy.
19	Aug 6 1990		Application (A90-96) granted by Justice Kennedy, allowing a maximum of 56 pages.
22	Aug 22 1990		Order extending time to file brief of respondent on the merits until September 7, 1990.
24	Sep 6 1990		Brief amicus curiae of Criminal Justice Legal Foundation filed.
25	Sep 7 1990		Brief of respondent Zant filed.
26	Sep 19 1990		CIRCULATED.
23	Sep 25 1990		Record filed.
		*	USCA 11-certified record.
28	Sep 26 1990		SET FOR ARGUMENT WEDNESDAY, OCTOBER 31, 1990. (1ST CASE)
27	Oct 12 1990	X	Reply brief of petitioner McCleskey filed.
29	Oct 31 1990		ARGUED.

89-7024

(2)

No. 89-

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1989

WARREN McCLESKEY,

Petitioner,

v.

WALTER D. ZANT, Superintendent,
Georgia Diagnostic & Classification
Center,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Supreme Court, U.S.
FILED
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QUESTIONS PRESENTED

1. Should a State, which has been proven (i) to have committed a constitutional violation in a criminal case and (ii) to have deliberately hidden that violation for ten years through a pattern of secrecy and deception, be permitted to assert "abuse of the writ" as a defense to a second federal habeas application -- on the ground that the applicant should have discovered the State's misconduct, and its deliberate cover-up, sooner?

2. Should a habeas applicant be deemed to have "deliberately abandoned" a constitutional claim of State misconduct when, after a "reasonably competent" investigation, he was unable to uncover facts either proving the misconduct or revealing the conspiracy by which the State misconduct was being hidden?

3. Should a Court of Appeals, in determining whether a State's constitutional violation was harmless error, be permitted under Rule 52(a) to disregard the express findings of fact, on the harmless error issue, that were made by the District Court below?

4. Should a Court of Appeals, in determining whether a State's constitutional violation was harmless error, be permitted to disregard the District Court's ultimate conclusion on that mixed question of fact and law?

5. Can the State's introduction of an unconstitutionally obtained confession -- which was the only item of direct testimony, by an apparently impartial witness, identifying the defendant as the triggerperson in a homicide -- be deemed harmless constitutional error, both as to guilt and as to penalty, in a capital case?

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No. 89-

IN THE

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October Term, 1989

WARREN McCLESKEY,

Petitioner,

v.

WALTER D. ZANT, Superintendent, Georgia Diagnostic & Classification Center,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Petitioner Warren McCleskey respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

CITATIONS TO OPINIONS BELOW

The District Court originally entered a judgment in petitioner's favor on February 1, 1984; that opinion is officially reported at 580 F. Supp. 338 (N.D. Ga. 1984). The Court of Appeals, sitting en banc, reversed the judgment of the District Court and denied relief on January 29, 1985; that opinion is officially reported at 753 F.2d 877 (11th Cir. 1987) (en banc). This Court entered a judgment on April 22, 1987,

affirming the Court of Appeals; that opinion is officially reported at 481 U.S. 279 (1987).

The District Court, on a second federal application, entered a judgment on January 15, 1988, nunc pro tunc for December 23, 1987, granting relief to petitioner; that opinion, which is not officially reported, is annexed as Appendix A. On January 6, 1989, the District Court entered an order denying respondent's motion under Rule 60(b); that opinion, which is not officially reported, is annexed as Appendix B. A panel of the Court of Appeals reversed the judgment of the District Court and denied relief on November 22, 1989; that opinion, which is officially reported at 890 F.2d 342 (11th Cir. 1989), is annexed as Appendix C.

JURISDICTION

The judgment of the Court of Appeals was entered on November 22, 1989, as amended on December 13, 1989. A timely petition for rehearing and rehearing en banc was denied on February 6, 1990. A copy of the order denying rehearing is annexed as Appendix D. The Court of Appeals stayed its mandate to and including March 23, 1990, pending the timely filing of a petition for certiorari; a copy of that order is annexed as Appendix E. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves 28 U.S.C. § 2244 (b), which provides in pertinent part:

> When after an evidentiary hearing on the merits of a material factual issue, or after a hearing on the merits of an issue of law, a person in custody pursuant to the judgment of a State court has been denied by a court of the United States . . . release from custody or other remedy on an application for a writ of habeas corpus, a subsequent application for a writ of habeas corpus in behalf of such person need not be entertained by a court of the United States . . . unless the application alleges and is predicated on a factual or other ground not adjudicated on the hearing of the earlier application for the writ, and unless the court . . . is satisfied that the applicant has not on the earlier application deliberately withheld the newly asserted ground or otherwise abused the writ.

This case also involves Rule 9 (b) of the Rules Governing Section 2254 Cases in the United States District Courts, which provides:

> Successive petitions. A second or successive petition may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ.

STATEMENT OF THE CASE

I. Statement Of Facts

A. The Police Misconduct -- A Violation of Massiah

At the heart of this appeal lies evidence of a successful scheme by State officials to procure an illegal "confession." According to the express findings of the District Court, one or more officers of the Atlanta, Georgia, Bureau of Police Services entered into a conspiracy with a known jailhouse informant, Offie Evans, to secure a confession from Mr. McCleskey. The purpose of

the police conspiracy was to identify which of four robbers had shot a fellow police officer, Frank Schlatt, as he entered a furniture store during the course of a robbery. The conspiracy violated McCleskey's Sixth Amendment right to counsel.

The facts substantiating this conspiracy are not seriously at issue on this appeal. The District Court, after three days of evidentiary hearings, expressly found that Captain Ulysses Worthy, a supervisory officer at the Fulton County Jail in Atlanta, Georgia, was, by chance, present during the jailhouse meeting between several Atlanta police detectives and a pretrial detainee, Offie Evans, at which the conspiracy was born. The detectives were investigating the death of Atlanta police officer Frank Schlatt. They met with inmate Evans in Captain Worthy's office at the Fulton County Jail to discuss the role of Warren McCleskey in that crime. McCleskey was also in the Fulton County Jail awaiting trial for Schlatt's murder. (App. A, at 15-17).

The District Court found that, during this meeting, one of the detectives turned to Captain Worthy and asked him to move inmate Evans from another part of the jail to a cell adjacent to McCleskey's

> for the purpose of gathering incriminating information; [inmate] Evans was probably coached in how to approach McCleskey and given critical facts unknown to the general public. [Following the move,] Evans engaged McCleskey in conversations and eavesdropped on McCleskey's conversations with [co-indictee Bernard] Dupree; and Evans reported what he had heard . . . to Assistant District Attorney Parker on July 12 [1978].

(App. A. at 23).

These findings are strongly supported by the record evidence from the federal habeas corpus proceeding. Captain Worthy twice testified about his presence at the meeting between Atlanta police detectives and inmate Evans. (R5-148). Worthy recalled that, during the meeting, Detective Sidney Dorsey (or perhaps some other "officer on the case") "asked Mr. Evans to engage in conversations with McCleskey who was being held in the jail." (R5-150). During the federal hearing, the District Court directly questioned Captain Worthy on the essential points:

> THE COURT: But you're satisfied that those three things happened, that they asked to have him put next to McCleskey, that they asked him to overhear McCleskey, and that they asked him to question McCleskey.
>
> THE WITNESS: I was asked can -- to be placed near McCleskey's cell, I was asked.
>
> THE COURT: And you're satisfied that Evans was asked to overhear McCleskey talk about this case?
>
> THE WITNESS: Yes, sir.
>
> THE COURT: And that he was asked to kind of try to draw him out a little bit about it?
>
> THE WITNESS: Get some information from him.

(R6- 64-65; accord, R6- 26-28).

Captain Worthy's testimony was independently confirmed and buttressed by a remarkable 21-page written statement which had been given by inmate Evans to Atlanta police officials in July of 1978, shortly after the initial meeting between Evans and the detectives. In the typewritten statement, Evans described in detail how he began to question McCleskey about the crime. He

bragged that, once in the adjacent cell, he (i) adopted a false name, (ii) claimed a close relationship with McCleskey's co-defendant, Ben Wright, (iii) lied about his own near-involvement in the crime, (iv) spoke to McCleskey about details of the crime which had not been made public and which were known only to Atlanta police and to the participants, (v) established himself with McCleskey as a reliable "insider," and then (vi) began systematically to press McCleskey for information about the crime.[1]

This evidence obtained by inmate Evans from McCleskey later became a centerpiece of the State's case during McCleskey's trial. Indeed, the State used Evans' testimony to establish three important points: (i) that Evans heard McCleskey confess

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[1] In his statement, inmate Evans bragged about his duplicity in dealing with Mr. McCleskey:

"I told Warren McClesky [sic] 'I got a nephew man, he in a world of trouble ...' McClesky asked me 'What is his name.' I told him 'Ben Wright.' McClesky said 'You Beens' [sic] uncle.' I said 'Yeah.' He said 'What's your name?' I told him that my name was Charles." (Fed. Exh. 8, at 3). After Evans falsely assured McCleskey that he "used to stick up with Ben," and that "Ben told me that you shot the man yourself," (id. at 4), Evans began to pry open the story of the crime. "I said man 'just what's happened over there?'" (Id.)

Even after McCleskey told him some details of the crime, Evans continued his surreptitious interrogation: "And then I asked McClesky what kind of evidence did they have on him." (Id. at 6). In a subsequent conversation, Evans sought to learn the location of the missing murder weapon: "Then I said, 'They ain't got no guns or nothing man?'" (Id. at 7). When Bernard Dupree, Mr. McCleskey's co-defendant, overheard the conversations between Evans and McCleskey from his cell upstairs and became apprehensive, Evans worked to allay Dupree's suspicions, "talking to Dupree about Reidsville [and] just about ma[king] Dupree know me himself." (Id. at 9).

to shooting police officer Schlatt (Tr. T. 870-871; Fed. Exh. 4, 870-871); (ii) that McCleskey told Evans ". . . he would have tried to shoot his way out . . . if it had been a dozen" police officers (Tr. T. 871; Fed. Exh. 4, 871);[2] and (iii) that McCleskey had explained to Evans what later became a glaring inconsistency in the identification testimony of another principal State's witness.[3]

Based on the testimony of Captain Worthy and on the 21-page statement of Offie Evans, the District Court concluded that

> petitioner's sixth amendment rights, as interpreted in Massiah, were violated by the use at trial of Evans' testimony about the petitioner's incriminating statements because those statements were deliberately elicited by an agent of the state after petitioner's indictment and in the absence of petitioner's attorney.

(App. A, at 30).[4]

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[2] This ostensible statement subsequently became a basis for the prosecutor's argument to the jury that Mr. McCleskey had acted with "malice." (See Tr. T. 974).

[3] According to inmate Evans, McCleskey had confessed during their jailhouse conversations that he had been wearing makeup and a disguise on the day of the crime (Tr. T. 301-303; 870-871; 876-879). This fact, if true, explained serious discrepancies in the eyewitness account of the robbers given by one witness.

[4] Although the specific misconduct of which the State was found liable here -- placing an informant in a cell and instructing him to interrogate a defendant surreptitiously -- may be argued to be an extension of the basic principle announced of Massiah v. United States, 377 U.S. 201 (1964), this Court clearly applied Massiah to forbid such jailhouse interrogations in United States v. Henry, 447 U. S. 264 (1980). At the time Henry was decided, on June 16, 1980, petitioner McCleskey was still pursuing his direct appeal, which did not become final until his petition for certiorari was denied by this Court on October 6, 1980. See McCleskey v. Georgia, 449 U.S. 891 (1980) (denying certiorari). Petitioner's subsequent assertion of this claim in collateral proceedings thus presents no "new law" problem under Teague v. Lane, __U.S.__, 103 L. Ed.2d 334 (1989) or its progeny.

B. The Issue Of Abuse Of The Writ

The Court of Appeals never reached the merits of petitioner's claim under Massiah v. United States, 377 U.S. 201 (1964). Instead, it held that petitioner had abused the writ of habeas corpus by failing to include a Massiah claim in his initial federal habeas petition. (App. C, 890 F.2d at 344).[5] Consequently, it is necessary to set forth the circumstances under which the Massiah violation first came to light.

1. The State's Failure To Produce Written Statements

a. The Efforts of Trial Counsel

Despite repeated efforts by Warren McCleskey's trial counsel to obtain any evidence that might reflect illegal State contact, the State failed to turn over Offie Evans' 21-page statement, or even to acknowledge that it existed. Prior to trial, McCleskey's defense attorney filed a written motion seeking all written or oral statements made by McCleskey to anyone, and all exculpatory evidence. After an in camera inspection, the trial court allowed the State to withhold both (i) the 21-page statement made by informant Evans and (ii) even the fact that the State possessed such a statement. (R1-1, Exh. M; R4-73-81; R6-118).

See, Penry v. Lynaugh, __U.S.__, 106 L.Ed.2d 256, 267-268 (1989) (habeas applicant is entitled to the benefit of changes in law that occur prior to denial of certiorari from direct appeal of conviction)

[5] The Court of Appeals also held that the State's Massiah violation was harmless beyond a reasonable doubt. The facts relevant to that claim will be set forth in ¶ C infra.

During mid-trial, defense counsel orally moved for the right to examine all documents in the State's possession that reflected any statements made by McCleskey. (R1-1, Exh. O, 830-832; see Fed. Exh. 6). The motion was denied; in so doing, the trial court inexplicably furthered the suggestion that the State possessed no undisclosed, written statements at all. (Judge: "I don't know that we are talking about any written statements.") (Id.)(emphasis added).

Defense counsel nonetheless decided to preserve this issue on appeal. The Georgia Supreme Court, however, apparently unwittingly, contributed to these developments by denying all relief, remarking that "[t]he evidence [that the defense counsel] sought to inspect was introduced to the jury in its entirety." McCleskey v. State, 245 Ga. 108, 263 S.E.2d 146, 150 (1980)(emphasis added). In sum, both the trial court and the Georgia Supreme Court left the unmistakable impression that the State had no written statements that had not been turned over to the defense. Defense counsel subsequently testified that he "was never given any indication that [any undisclosed] statement existed." (St Hab. Tr. 77).

b. The Efforts of Habeas Counsel

The State continued to stonewall Warren McCleskey's counsel about the existence of the 21-page statement throughout state habeas proceedings. At the outset of those proceedings in 1981, present counsel entered the case as volunteers on McCleskey's behalf. Although they gleaned from the trial record that the

State apparently possessed no written statements from McCleskey, and although they lacked anything more than an unsubstantiated suspicion of a Massiah violation, they nonetheless decided, as a precaution, to include a Massiah claim along with twenty-two other constitutional challenges asserted in McCleskey's state petition.

Attorney Robert Stroup followed up the Massiah claim with an extensive investigation designed to uncover any facts that might support it. He first met with members of the Atlanta police force (whom he had represented in unrelated Title VII cases) for advice on the best way to uncover any available evidence of an illegal, jailhouse informant relationship. (R4 31-32). Armed with their advice, he then interviewed a number of key jailors at the Fulton County Jail. (R4 33). None of these jail officials knew anything about a surreptitious police informant in McCleskey's case.

Attorney Stroup nonetheless persevered, tracking down a former jail official, Bobby Edwards, who had been in charge of all inmate cell placements at the time McCleskey had been incarcerated. By 1981, Mr. Edwards had retired and was living over 60 miles from Atlanta; Stroup managed to find and interview him. Edwards had no knowledge suggesting evidence to support the claim of illegal misconduct.[6]

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[6] At the time, the Fulton County Jail was staffed by several shifts of jailors (R6 76); the total cell population was between 900-1700; each shift was staffed by literally scores of officers. (R6 73). Mr. Stroup admittedly did not personally interview each of the several hundred jailors, some of them

Stroup then directly sought, during discovery in the state habeas action, the prosecutor's file in the case. He was sent a mass of documents from a Georgia Assistant Attorney General, accompanied by a letter assuring Stroup that he was receiving "a complete copy of the prosecutor's file resulting from the criminal prosecution of Warren McCleskey." (Fed. Exh. 7) (emphasis added). Informant Evans' crucial 21-page statement was not included among the documents transmitted.[7] At no time, either at that point or later, did lawyers for the District Attorney or for the Georgia Attorney General's office ever turn over Evans' 21-page account of his undercover interrogation of Warren McCleskey.

To complete his investigation, Mr. Stroup questioned inmate Offie Evans under oath during state habeas proceedings and deposed the Assistant District Attorney who had prosecuted McCleskey. The prosecutor gave no hint that the State's relationship with its key witness, Offie Evans, might have been improper:

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retired by 1981, who had been employed by the Fulton County Jail in 1978. He confined his investigations on this claim -- one of 22 separate constitutional issues which he, a pro bono volunteer attorney was then pursuing -- to interviews with the employees identified as most likely to have relevant information. None of those officers knew of any evidence suggesting that a Massiah violation might have occurred.

[7] Mr. Stroup has subsequently testified that, in reliance on these written representations of the State of Georgia, it simply did not occur to him that this representation was false, that a written statement existed, and that he was being misled. (R1- 7-10). The District Court credited Mr. Stroup's testimony on this point. (R1- 118-119; R3-- 22-25).

> Q. [Mr. Stroup]: Okay. Were you aware at the time of the trial of any understandings between Evans and any Atlanta police department detectives regarding favorable recommendation [sic] to be made on his federal escape charge if he would cooperate with this matter?
>
> A. [Assistant District Attorney]: No, sir.
>
> Q. Let me ask the question another way to make sure we are clear. Are you today aware of any understanding between any Atlanta police department detectives and Offie Evans?
>
> A. No, sir, I'm not aware of any.

(Fed. Exh. 3, 9-10).

On cross-examination, the Assistant District Attorney broadened his testimony:

> Q. Do you have any knowledge that Mr. Evans was working as an informant for the Atlanta Police or any police authorities when he was placed in the Fulton County Jail and when he overheard these conversations of Mr. McCleskey?
>
> A. I don't know of any instance that Offie Evans had worked for the Atlanta Police Department as an informant prior to his overhearing conversations at the Fulton County Jail.

(Fed. Exh. 3, 14-15).

Mr. Stroup subsequently testified that, following McCleskey's state habeas proceedings, he concluded that the Massiah claim could not be substantiated:

> ... I looked at what we had been able to develop in support of the claim factually in the state habeas proceeding and made the judgment that we didn't have the facts to support the claim and, therefore, did not bring it into federal court.

(R4- 44).

2. The Discovery Of The State's Cover-up

Offie Evans's 21-page statement did not come to light until June of 1987 -- six years after Mr. McCleskey's initial federal habeas petition had been filed. Its existence was revealed only following a fortuitous development in an unrelated Georgia case.[8] Once the statement was in petitioner McCleskey's possession, however, he acted immediately to make it the centerpiece of a Massiah claim which he included in his second federal petition filed in July of 1987. (See R1-9 & Exh. E).

Even in the face of the written statement, State officials continued to deny any illegal activity. During federal hearing on his second petition, McCleskey's attorneys sought to develop all the circumstances under which the statement had initially been taken. In response to an inquiry about where the statement had been taken, one of the police officers, Detective Welcome Harris, mentioned "a room [at the Fulton County Jail] that was occupied by a captain, and I don't think -- he's no longer employed out there, I think his name is Worthy." (R4 195).

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[8] In that case, Napper v. Georgia Television Co., 257 Ga. 156, 356 S.E.2d 640 (1987), the Supreme Court of Georgia appeared to hold, for the first time, that police investigative files would be deemed within the compass of the Georgia Open Records Act, O.C.G.A. § 50-18-72(a) for purposes of disclosure during habeas corpus proceedings in that case. Mr. Stroup immediately cited that then-recent decision, still pending before the Georgia Supreme Court on rehearing, in support of a request directly to the Atlanta Bureau of Police Services, seeking the original police files in McCleskey's case. (R1-7-6). Because Napper was still pending on rehearing, attorneys for the Atlanta Bureau were reluctant to disclose the entire police file, but on June 10, 1987, they agreed to provide Mr. Stroup with one document--which proved to be the 21-page statement made by Offie Evans. (R1-7-7).

Asked whether Captain Worthy had been present during the interview, Detective Harris replied, "No, sir. I'm sure he wasn't, you know." (R4 196).

Although the police suggested that Captain Worthy had not been present for the interview, and although he had long been retired from service at the jail, McCleskey's attorneys nonetheless sought to locate and subpoena him to appear during the waning hours of McCleskey's 1987 federal hearing -- one of many subpoenas issued to those whose names were first mentioned during the course of the two-day federal hearings. (R4-21).

Mr. Worthy's appearance and his testimony, outlined above, came as a complete surprise to McCleskey's attorneys, to the Attorney General, and to everyone else present at the hearing (see R5 166) -- except, no doubt, those who were active parties in the Massiah violation and in the State's subsequent ten-year cover-up.

3. The District Court's Findings On Abuse

After receiving documentary evidence and hearing live testimony, the District Court made comprehensive findings on the issue of abuse of the writ. The Court first considered the State's defense of deliberate abandonment:

> [P]etitioner cannot be said to have intentionally abandoned this claim. Although petitioner did raise a Massiah claim in his first state petition, that claim was dropped because it was obvious that it could not succeed given the then-known facts. . . Abandoning a claim whose supporting facts only later become evident is not an abandonment that "for strategic, tactical, or any other reasons . . . can fairly be described as the deliberate by-passing of state procedures." Fay v. Noia, 372 U. S. 391, 439 (1963), quoted in Potts v. Zant, 638 F.2d 727, 743 (5th Cir. 1981). . . . This is not a case where petitioner has reserved his proof or deliberately withheld his claim for a second petition. Sanders v. United States, 373 U.S. 1, 18 (1963).

(R4 118-119). Turning to the issue of "inexcusable neglect," the Court observed that

> there is . . . no inexcusable neglect unless "reasonably competent counsel" would have discovered the evidence prior to the first federal petition. This court [has] concluded . . . that counsel's failure to discover Evans' written statement was not inexcusable neglect. [R4-118-119]. The same is true of counsel's failure to discover Worthy's testimony. . . [C]ounsel did conduct an investigation of a possible Massiah claim prior to the first federal petition, including interviewing "two or three jailers." . . . The state has made no showing of any reason that petitioner or his counsel should have known to interview Worthy specifically with regard to the Massiah claim.

(R3-22- 24-25).

C. The Issue Of Harmless Error

1. The State's Evidence At Trial

Officer Frank Schlatt was shot as he entered the Dixie Furniture Company on May 13, 1978 in response to a silent alarm indicating that a robbery was in progress. There were no eyewitnesses to the shooting of Officer Schlatt, although a number of witnesses identified four robbers, including Warren McCleskey, as those present in the store.

Petitioner McCleskey initially entered the furniture store from the front while his three co-defendants entered from the rear. The four robbers, however, herded all the employees to several offices in the rear half of the store and forced them to lie face-down on the floor while they carried out the robbery.

These plans were well underway when Officer Frank Schlatt entered the furniture store by the front door.

No employee was able to testify which of the four co-defendants fired the shots that killed Officer Schlatt. The State offered two other witnesses, however, who told the jury that Warren McCleskey had confessed to the shooting. One was Ben Wright, McCleskey's co-defendant. Wright had been a leader in planning and carrying out the robbery; he had directed the other participants (e.g., Tr. T. 651, 657); and he was a highly likely suspect in the shooting. Wright acknowledged during his trial testimony that the State intended to recommend 20-year concurrent sentences for his part in the murder and armed robbery in exchange for his testimony against Warren McCleskey. (Tr. T. 646-647; 682-683.). The District Court found that his testimony "was obviously impeachable." (App. A, at 30.)

Just before it retired to deliberate on guilt or innocence, however, the jury heard another witness, an apparently neutral third party who told the jury of McCleskey's ostensible jailhouse confession: that witness was Offie Evans.

Apart from Wright and Evans, the State's case rested largely upon circumstantial evidence in an effort to place the murder weapon in McCleskey's hand. Both co-defendant Ben Wright and Wright's girlfriend testified that, on the day of the crime, McCleskey had been carrying a pearl-handled, silver .38 pistol linked to the homicide. (Tr. T. 649; 727). Yet on cross-examination, Wright admitted that he, not McCleskey, had

personally carried the .38 pistol for weeks at a time prior to the crime. (Tr. T. 682). Moreover, Wright's girlfriend admitted under cross-examination that she had informed police, on the day Wright was arrested, that it was Wright, not McCleskey, who had been carrying the .38 pistol on the day of the furniture store robbery. (Tr. T. 607; 631-634).[9]

2. The Jury's Verdict: Malice Murder

At the close of the guilt phase, the Superior Court instructed the jury on theories of malice murder (Tr. T. 998-999) and of felony murder. (Tr. T. 999-1000). In its charge on malice murder, the trial court instructed the jury that "a person commits murder when he unlawfully and with malice aforethought, either express or implied, causes the death of another human being." (Tr. T. 1000). In its charge on felony murder, the trial court informed the jury that "[t]he homicide is committed in the

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[9] The panel, both in its initial description of the crime (App. C, 890 F.2d at 344) and its analysis of the harmless error issue (id. at 352), overlooked or disregarded these record facts, drawn directly from the trial transcript. It drew its view of the facts, instead, from a summary of the crime contained in the 1980 opinion of the Supreme Court of Georgia on Mr. McCleskey's direct appeal. That opinion had been written seven years prior to the District Court's factfindings, at a time when no Massiah challenge was before that or any court. Its summary statement of facts did not, of course, preclude the more careful findings made years later by the District Court on McCleskey's Massiah claim, after a full federal hearing, at a time when the significance of the State's circumstantial case, weighed against its other evidence, had come plainly into view. See, e.g., Townsend v. Sain, 372 U.S. 291, 316 (1963); Magwood v. Smith, 791 F.2d 1438, 1448-1450 (11th Cir. 1986); Green v. Zant, 715 F.2d 551,557-558 (11th Cir. 1983); cf. Harris v. Oliver, 645 F.2d 327 (5th Cir. Unit B 1981) (state findings need not be accepted when not anchored in proper legal standard).

perpetration of a felony when it is committed by the accused while he is engaged in the performance of an act required for the full execution of such a felony." (Tr. T. 1000) (emphasis added), and that the jury should convict "if you believe and find beyond a reasonable doubt that the homicide alleged in this indictment was caused by the defendant while he, the said accused, was in the commission of an armed robbery . . . ." (Id.).[10]

During its deliberations, the jury sought further instructions on the issue of malice murder. The Superior Court repeated its instructions. (Tr. T. 1007-1009). Ten minutes later, the jury returned, finding Mr. McCleskey guilty of malice murder and two counts of armed robbery. (Tr. T. 1010).

3. The District Court's Finding On Harmless Error

The District Court, after reviewing the trial record, concluded that Offie Evans' "testimony about petitioner's incriminating statements was critical to the state's case," and that the admission of Evans' testimony could not be deemed harmless:

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[10] The court had earlier charged the jury, in a general section, on the doctrine of "parties to a crime," as follows:

> That statute says that every person concerned in the commission of a crime is a party thereto and may be charged with and convicted of commission of the crime, and then it has several subsections. It says that a person is concerned in the commission of a crime only if he directly commits the crime, intentionally aides or abets in the commission of the crime, or intentionally advises, encourages, hires, counsels or procures another to commit the crime.

(Tr. T. 994).

> There were no witnesses to the shooting and the murder weapon was never found. The bulk of the state's case against the petitioner was three pronged: (1) evidence that petitioner carried a particular gun on the day of the robbery that most likely fired the fatal bullets; (2) testimony by co-defendant Ben Wright that petitioner pulled the trigger; and (3) Evans' testimony about petitioner's incriminating statements. As petitioner points out, the evidence on petitioner's possession of the gun in question was conflicting and the testimony of Ben Wright was obviously impeachable. . . . Because the court cannot say, beyond a reasonable doubt, that the jury would have convicted petitioner without Evans' testimony about petitioner's incriminating statements, petitioner's conviction for the murder of Officer Schlatt must be reversed pending a new trial.

(App. A, at 29-31).

D. The Holding of the Panel

1. Abuse Of The Writ

The panel decided this appeal on the express assumption "that McCleskey was unaware of both [the 21-page statement and Captain Worthy]" when he filed his initial petition. The critical legal question, from the panel's perspective, was "whether McCleskey's unawareness of the factual bases for his Massiah claim at the time of his first federal habeas petition is sufficient to justify his failure to present the claim." (App. C, 890 F.2d at 348).

In answering that question, the panel faulted the District Court for "misconstru[ing] the meaning of deliberate abandonment." (Id. at 349). Since Mr. McCleskey's attorneys had been aware of the legal issue, (id.), the panel reasoned, it was appropriate to impute to them some unspecified knowledge of the facts as well. The panel concluded that counsels' decision not

to go forward with the Massiah claim into federal court "constitutes prima facie evidence of deliberate abandonment." (Id).

> [W]e must assume that at the time McCleskey filed his first state habeas petition, counsel had determined that there was some factual basis for a Massiah claim. Indeed, such a determination is not surprising. Not only was counsel aware that Evans was in a cell next to McCleskey, but counsel was also aware that some sort of relationship existed between Evans and the police, as this formed the basis of McCleskey's Giglio claim.[11] The petitioner and his counsel did not accidentally fail to include the Massiah claim in the federal petition, but made a knowing choice not to pursue the claim after having raised it previously. This constitutes prima facie evidence of deliberate abandonment.

(App. C, 890 F.2d at 349).

The panel acknowledged that petitioner's attorneys had made unsuccessful efforts to locate concrete evidence of a Massiah violation. The panel faulted those efforts as "somewhat lacking."

> A petitioner and his counsel may not circumvent the abuse of the writ doctrine by failing to follow through with an investigation and then later asserting that the claim could not have succeeded earlier on the facts as then known. It will only be possible to avoid piecemeal litigation if counsel is required to make a thorough investigation of the facts at the time of petitioner's first petition for habeas corpus.

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[11] Petitioner alleged during his initial state and federal habeas proceedings that Offie Evans had testified in exchange for promises of favorable State treatment. Evans had disavowed receiving such promises during his cross-examination at McCleskey's trial. The Court's opinion in Giglio v. United States, 405 U.S. 150 (1972) held that a witness's failure to reveal any such promise would violate the Due Process Clause of the Fourteenth Amendment.

(App. C, 890 F.2d at 350).[12]

In effect, the panel held that facts admittedly unknown to a petitioner would be attributed to him in assessing whether he had "deliberately abandoned" a claim, unless petitioner's counsel had conducted a "thorough investigation." The panel made no effort to reconcile this new standard with the District Court's express finding that counsel's investigation had been "reasonably

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[12] The panel mentioned that McCleskey's counsel had never interviewed the detectives ultimately implicated in the coverup or another jail official who testified during McCleskey's trial. (App. C, 890 F.2d at 349-350 n. 12). Yet the panel ignored both (I) the District Court's express finding that counsel's actions on this point were not inexcusable under all the circumstances, and (ii) its observation that the detectives' denial of all misconduct, under oath, during federal habeas proceedings, made it plain that "conducting such interviews would [not] have allowed petitioner to assert this claim any earlier." (App. A, at 22-25).

The panel likewise faulted petitioner for failing to "present[] any reason why counsel would have been unable to contact Ulysses Worthy back in 1981 when the first federal habeas petition was filed." (App. C, 890 F.2d at 350). Two reasons, however, were evident from the record. First, Worthy's name did not even surface until midway during the federal habeas hearing; even then, the police mentioned him only as a retired jail officer in whose office the 21-page statement had been taken--according to the police, in Worthy's absence. Second, the Fulton County Jail had been staffed by hundreds of jail employees in July of 1978; nothing linked Captain Worthy to the McCleskey case until testimony emerged that his office had been used to obtain the 21-page statement whose very existence had been hidden from petitioner's attorneys for 10 years.

Finally, the panel noted that petitioner had "not shown that a more extensive effort at that time to track down persons with information as to what transpired in the county jail during the summer of 1978 would not have turned up Worthy." (App. C, 890 F.2d at 350). The District Court, however, expressly found that reasonably competent counsel could not have been expected to uncover these other witnesses. (App. A, at 24-25).

competent," and that petitioner had not been guilty of inexcusable neglect under all the circumstances.

2. Harmless Error

The panel drew its view of the State's case neither from the trial transcript nor from the District Court's factfindings, but instead from a brief and inaccurate summary of the crime contained in a 1980 opinion by the Supreme Court of Georgia on McCleskey's direct appeal. In consequence, the panel fully credited a view (i) that McCleskey had entered the furniture store from the front, (App. C, 890 F.2d at 344); (ii) that "[t]he officer was killed by the man who entered and secured the front of the store while the other three men were in the back," (App. C, 890 F.2d at 352); (iii) that "McCleskey had a .38 caliber Rossi" pistol, (App. C, at 344), and (iv) that "the officer was killed by a bullet from a .38 caliber Rossi handgun." (App. C, at 352).

Relying on this "substantial amount of circumstantial evidence" (id.), the panel concluded that the

> evidence other than Evans' testimony presented in the case presents such clear indication of McCleskey's guilt, [that] this court finds beyond a reasonable doubt that the jury would have convicted and sentenced McCleskey as it did even without Evans' testimony.

(id. at 353).

REASONS FOR GRANTING THE WRIT

I.

THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER A STATE MAY ASSERT THE DEFENSE OF "ABUSE OF THE WRIT," ON A SECOND FEDERAL HABEAS APPLICATION, AFTER IT HAS SUCCESSFULLY CONCEALED ITS OWN CONSTITUTIONAL VIOLATION FROM THE HABEAS APPLICANT DURING THE INITIAL FEDERAL APPLICATION

A. The State's Unclean Hands

This Court has traditionally insisted that, in criminal cases, the misconduct of any member of the prosecution team must be deemed state action and imputed to the State itself. See, e.g., Mooney v. Holohan, 294 U. S. 103 (1935); Brady v. United States, 373 U.S. 83 (1963). The good faith of some members of the State's team cannot excuse the bad faith of others, since, as Chief Justice Burger reasoned in Giglio v. United States,

> [t]he prosecutor's office is an entity and as such it is the spokesman for the Government. A promise made by one attorney must be attributed, for these purposes,. to the Government. See Restatement (Second) of Agency § 272. See also American Bar Association Project on Standards for Criminal Justice, Discovery and Procedure Before Trial § 2.1(d). To the extent this places a burden on the large prosecution offices, procedures and regulations can be established to carry that burden and to ensure communication of all relevant information on each case to every lawyer who deals with it.

405 U. S. 150, 154 (1972). Accord: Michigan v. Jackson, 475 U. S. 625, 634 (1986) ("Sixth Amendment principles require that we impute the State's knowledge from one state actor to another. For the Sixth Amendment concerns the confrontation between the Sate and the individual"); Santobello v. New York, 404 U.S. 257, (1971)(initial prosecutor's plea offer held binding on subsequent prosecutor); Cf. United States v. Bagley, 473 U. S. 667, 671 &

n.4 (1986) (conduct by state law enforcement agents working with federal investigators imputed to federal prosecutor's office) [13]

In this case, the District Court found as fact that Atlanta police detectives entered into a secret -- and flagrantly unconstitutional -- relationship with a jailhouse informant, Offie Evans, to secure damning evidence against petitioner Warren McCleskey. The conspiracy, known only to the police detectives, to the informant, and to one jailor, Captain Ulysses Worthy, was successfully hidden for more than a decade. Their misdeeds came to light only in July of 1987, a few days before Warren McCleskey's scheduled execution.

Ever since that time, the State -- now represented by the Attorney General -- has sought to distract attention from the merits of McCleskey's constitutional claim under Massiah, and to redirect the spotlight away from its own misconduct and toward the ostensible errors of petitioner's habeas counsel. The State's remarkable proposition is that they should receive a double reward for their agents' conspiracy: first, the initial

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[13] The lower federal courts have regularly applied this rule to police misconduct of the sort at issue here. See, e.g., Freeman v. State of Georgia, 599 F.2d 65, 69-70 (5th Cir. 1979) ("We feel that when an investigating police officer willfully and intentionally conceals material information, regardless of his motivation and the otherwise proper conduct of the state attorney, the policeman's conduct must be imputed to the state as part of the prosecution team"); Barbee v. Warden, 331 F.2d 842 (4th Cir. 1964) ("The police are also part of the prosecution, and the taint on the trial is no less if they, rather than the State's Attorney, were guilty of the nondisclosure. . . ."); Schneider v. Estelle, 552 F.2d 593 (5th Cir. 1971); Jackson v. Wainwright, 390 F.2d 288, 296 (5th Cir. 1968); Curran v. State of Delaware, 259 F.2d 707, 713 (3d Cir. 1958).

death sentence, won in significant measure through inmate Evans' testimony; and now, a successful "abuse of the writ" defense, won by charging McCleskey's attorneys with the failure to have uncovered the State's own misconduct earlier -- misconduct which was vigorously and deliberately suppressed, by State actors, through a decade of perjury and deceit. [14]

The Court recently confronted similar State misconduct, and faced a strikingly similar attempt by the State to avoid responsibility for its actions, in Amadeo v. Zant, __U.S.__, 100 L.Ed.2d 249 (1988). There, as here, a State actor had secretly violated the federal constitution -- a prosecutor had surreptitiously instructed jury commissioners on a scheme to evade federal jury composition standards. 100 L.Ed. 2d at 257. There, as here, incriminating evidence was theoretically available -- in Amadeo, a cryptic memo wedged in the jury commissioners' files, in McCleskey, a retired jailor, one of hundreds who had worked in the Fulton County Jail at the time. There, as here, the District Court found that the evidence had not been reasonably available to defense counsel. There, as here, once evidence of the misconduct came to light, the State insisted that the merits of the jury claim should not be heard,

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[14] No doubt, had petitioner McCleskey decided to carry his Massiah claim into federal court on his initial federal application, having failed to uncover any evidence to support the claim during his initial state habeas proceedings, respondent would have launched a vigorous professional attack against petitioner's counsel for making frivolous charges against the State despite a lack of factual support.

since the habeas applicant had not discovered the misconduct in time. 100 L.Ed.2d at 258.

There, as here, a District Court, after an evidentiary hearing, granted relief on the merits, finding as fact that the applicant's defense attorneys had not engaged in "'sandbagging' or 'deliberate bypass,'" 100 L.Ed.2d at 258 and that their conduct had been "reasonable . . . in light of all the circumstances." Id. at 259. There, as here, a panel of the Court of Appeals overturned the District Court's judgment--disregarding the District Court's findings of fact and concluding that the evidence of State misconduct had been "readily discoverable." 100 L.Ed.2d at 259.

The only difference between Amadeo and this case is their procedural posture. The issue in Amadeo was whether the State's misconduct constituted sufficient "cause" under Wainwright v. Sykes, 433 U. S. 72 (1977) to excuse the applicant's procedural default -- his failure to have asserted the claim at trial. 100 L.Ed.2d at 259-260. Responsive to this Court's teachings in Murray v. Carrier, 477 U. S. 478, 488 (1986), the District Court concluded that the clear evidence of "'some interference by [state] officials,'" constituted sufficient "cause" to excuse Amadeo's procedural default.

There is no defensible reason, however, why State misconduct uncovered after direct appeal but in time for presentation on an initial federal application, should be treated differently, under a "cause" and "prejudice" analysis,

from misconduct that the State has somehow managed to hide until after initial habeas proceedings are completed. If the State has deliberately withheld evidence of its own unconstitutional behavior, federal courts simply should not entertain a defense of laches or of abuse under Rule 9 (b). The very equitable foundations of the writ forbid any party from seeking relief if it comes to the federal courts with unclean hands.

Indeed, in Sanders v. United States, 373 U.S. 1 (1963), the Court began its analysis of successive petition jurisprudence with the proposition

> that 'habeas corpus has traditionally been regarded as governed by equitable principles. . . Among them is the principle that a suitor's conduct in relation to the matter at hand may disentitle him to the relief he seeks.

373 U.S. at 17-18. Pointing to inequitable conduct that would preclude a habeas applicant from obtaining relief, the Court mentioned cases in which "a prisoner deliberately withholds one of two grounds for federal collateral relief," or engages in "needless piecemeal litigation . . whose only purpose is to vex, harass, or delay." 373 U. S. at 18.

Here, the District Court carefully reviewed the behavior of petitioner and his counsel and found, as fact, that they had not engaged in such misconduct:

> [P]etitioner cannot be said to have intentionally abandoned this claim. . . Abandoning a claim whose supporting facts only later became evident is not an abandonment that "for strategic, tactical, or any other reasons . . . can fairly be described as the deliberate by-passing of state procedures." Fay v. Noia, 372 U. S. 391, 439 (1963). . . This is not a case where petitioner has reserved his proof or deliberately withheld his claim for a second petition. .

> . Second, petitioner's failure to raise this claim in his first federal habeas petition was not due to his inexcusable neglect. . . . Petitioner's counsel represents, and the state has not disputed, that counsel did conduct an investigation of a possible Massiah claim prior to the first federal petition. . . . The state has made no showing of any reason that petitioner or his counsel should have known to interview [Captain] Worthy specifically with regard to the Massiah claim. . . . Petitioner's failure to discover this evidence earlier was not due to inexcusable neglect.

(App. A, 24-26).

Yet the panel's opinion on appeal reads as if the State's underlying misconduct was utterly irrelevant, and the State's ensuing perjury and deceit, only some hide-and-seek game which the State won -- and Warren McCleskey lost. Blind both to the State's initial wrongdoing and to its ten-year cover-up, the panel embraced the State's "abuse of the writ" defense and focused solely on the ostensible deficiencies of McCleskey's counsel. By so doing, the panel ignored this Court's consistent teaching that states must be held accountable for their own deliberate misconduct in criminal cases.

Only by setting Mooney, Brady, Giglio, Michigan v. Jackson, Santobello, Bagley, and Amadeo v. Zant to one side could the panel's opinion be affirmed.

B. The Panel's Redefinition Of "Deliberate Abandonment"

Yet the panel's opinion did more than overlook the State's equitable disentitlement to assert an "abuse of the writ" defense. On the merits, the panel (i) redefined the basic meaning of the "deliberate abandonment" standard under Rule 9(b), and (ii) ignored the command of Rule 52.

To assess whether a habeas applicant has "deliberately abandoned" a claim, federal courts normally determine whether a petitioner made "an intentional relinquishment or abandonment of a known right or privilege," adhering to the classic terms of Johnson v. Zerbst, 304 U.S. 458, 464 (1938) (emphasis added).[15] The panel held, however, that even an applicant, like petitioner McCleskey, who admittedly had been denied access to the critical fact by the State, should be deemed to have "deliberately abandoned" a claim unless he has engaged in a "thorough investigation" of the facts.[16]

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15 Perhaps the most definitive case applying Zerbst to successive petitions is Price v. Johnston, 334 U.S. 266 (1948). There, the Court limited federal courts' power to dismiss a second petition to instances in which a petitioner had full access to "proof [of the claim] which was accessible at all times." 334 U.S. at 289. The court refused to "assume that petitioner [Price] has acquired no new or additional information since the time of the trial or the first habeas corpus proceeding that might indicate fraudulent conduct on the part of the prosecuting attorneys." 334 U.S. at 290.

16 We note that the following steps, all of them indisputably taken by petitioner's attorneys, were deemed insufficient to constitute a "thorough investigation" :

- o trial counsel formally moved to obtain all written statements from the State;
- o trial counsel renewed his request for such statements;
- o habeas counsel, despite the lack of prior success by trial counsel, nonetheless asserted a Massiah claim;
- o habeas counsel, during their investigation, talked with the Fulton County jailors identified as those most likely to know about any Massiah violation;
- o habeas counsel, having learned about a retired jail official who had been responsible for cell placement in 1978, tracked that jailor down, to no avail;
- o habeas counsel sought from the State, and were given, what the State represented to be "a complete copy of the prosecutor's file," but which was missing the 21-page statement;

The panel's application of this new, "thorough investigation" standard in McCleskey's case reveals it for what it is: a rule holding habeas applicants strictly liable for any failure to uncover evidence on their initial federal application. The only other reasonable reading of the panel's "thorough investigation" standard would simultaneously underscore yet a second transgression of Amadeo v. Zant, for the opinion brushes aside the District Court's express finding that "'reasonably competent counsel' could [not] have discovered the evidence prior to the first federal petition," (App. A, at 25), and that therefore, McCleskey's counsel were not guilty of "inexcusable neglect." (Id.) Either the panel's opinion creates a new, stricter standard of attorney performance than the traditional "inexcusable neglect" branch of abuse law, or the panel's opinion violated Amadeo and Anderson v. Bessemer City, 470 U.S. 564 (1985) sub rosa by reweighing the factual evidence on counsel's performance and disregarding the District Court's clear findings that the investigation undertaken by petitioner's habeas attorneys was reasonable. Under either reading, the opinion is certworthy.

- habeas counsel asked the prosecutor and the informant, under oath, whether there had been an improper relationship;
- when the informant's 21-page statement was uncovered, habeas counsel immediately filed a second petition;
- habeas counsel questioned police officers to learn where the statement had been taken from Evans;
- having learned that it had been taken in a Captain Worthy's office, they found and subpoenaed Worthy on the off chance that he might have relevant knowledge.

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The panel's acceptance of the State's "abuse of the writ" defense, despite the State's unclean hands; its disregard of this Court's earlier teachings on State misconduct; its refusal to apply the rationale of Amadeo v. Zant to a closely analogous habeas; and its creation of a new standard for assessing "deliberate abandonment," all present substantial questions of law meriting full review on certiorari by the Court.

II

THE COURT SHOULD GRANT CERTIORARI TO RESOLVE IMPORTANT UNSETTLED QUESTIONS REGARDING THE APPLICABILITY OF RULE 52(A) STANDARDS TO HARMLESS ERROR

This case also presents important questions regarding the standard to be applied when a federal appellate court reviews a district court's factfindings on the issue of harmless error.

The question arises here because the panel substituted its own findings -- not only on the ultimate issue, but on subsidiary questions of fact -- for those made by the District Court, and it did so without any mention of the clearly erroneous standard of Rule 52(a). Plainly, the panel did not view itself as bound by the clearly erroneous rule in the harmless error context, apparently either in reviewing the underlying historical facts or in making its ultimate determination.

The District Court, however, did make a number of important factfindings that were subsidiary to its conclusion that the State's Massiah violation was not harmless. The District Court began its analysis by correctly noting that there had been no

witnesses to the shooting (App. A, at 30) and that the murder weapon had never been found. (Id.). The Court then found that the bulk of the State's case against petitioner had been three-pronged: (i) evidence that petitioner had carried a .38 Rossi, the pistol that most likely fired the fatal bullets, on the day of the robbery,; (ii) testimony by co-defendant Ben Wright that petitioner told Wright he had pulled the trigger; and (iii) informant Offie Evans' unconstitutionally-tainted testimony about petitioner's "jailhouse confession." (Id.).

In assessing the quality of this evidence, the District Court found that the weight of the first two prongs was not substantial Addressing the first prong -- who was carrying the murder weapon on the day of the crime -- the District Court found that the State had presented conflicting evidence to the jury on this issue. (App. A., at 30). Indeed, one of the State's witnesses on this point, the girlfriend of the co-defendant Ben Wright, acknowledged on cross-examination that she had told police that her boyfriend, Ben Wright, and not McCleskey, had carried the .38 Rossi on the day of the crime. (Tr. T. 682).

As to Ben Wright's damaging testimony about McCleskey's ostensible "confession" to him, the District Court found that it was "obviously impeachable," (App. A, at 30), since Wright was himself a prime suspect in the shooting who had a clear motive to shift responsibility for the murder to someone else.

On the basis of these facts, the District Court concluded that the tainted informant's testimony regarding McCleskey's

jailhouse confession "was critical to the state's case," (App. A, at 30) and, therefore, not harmless.

The panel opinion disregarded these findings of fact, substituting its own instead. As to the identity of the robber who carried the .38 Rossi, for example, the panel cited only the testimony that pointed toward McCleskey (App. C, 890 F.2d at 352); it ignored the strong conflicting testimony identified by the District Court. Similarly, the panel emphasized that co-defendant Ben Wright had testified that McCleskey was the triggerman (App. C, 890 F.2d at 352); but it ignored the District Court's finding that Wright's testimony was "obviously impeachable."

In sum, while the District Court found below that the non-tainted evidence was severely compromised, the panel on appeal independently reweighed that evidence and concluded that it "presented a clear indication of McCleskey's guilt." (App. C, 890 F.2d at 353). Having thus substituted its own reading of the record for that of the District Court, the panel concluded that the State's introduction of Offie Evans' jailhouse confession was harmless error.

As an initial matter, the panel's judgment seems to violate this Court's interpretation of Rule 52(a) set forth in Amadeo v. Zant, __U.S.__, 100 L.Ed.2d 249 (1988). In that case, the Court reasoned that

> [a]lthough there is significant evidence in the record to support the findings of fact favored by the Court of Appeals, there is also significant evidence in the record to support the District Court's contrary conclusion . . . We

> frequently have emphasized that '[w]here there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous.' Anderson v. Bessemer City, 470 U.S. at 574, citing United States v. Yellow Cab. Co., 338 U.S. 338 (1949), and Inwood Laboratories, Inc. v. Ives Laboratories, Inc., 456 U. S. 844 (1982). We reaffirm that stricture today.

100 L.Ed.2d at 262.

Even if the panel in McCleskey's case could be viewed as having done nothing more than to overturn the District Court's ultimate conclusion on a mixed question of fact and law, its judgment would nonetheless raise important questions of federal law which this Court has not previously addressed.

While the federal appeals courts are in general, although not universal, agreement that the question of harmless error is a mixed question of law and fact,[17] they are in conflict on the applicability of Rule 52(a) to such a question. This Court has previously noted the existence of this conflict in Pullman-Standard v. Swint, stating,

> We need not, therefore, address the much-mooted issue of the applicability of the Rule 52(a) standard to mixed questions of law and fact -- i.e., questions in which the historical facts are admitted or established, the rule of law is undisputed, and the issue is whether

17 Graham v. Wilson, 828 F.2d 656, at 659 (10th Cir. 1987) ("Determination of harmless error is a mixed question of law and fact."); Ruff v. Kincheloe, 843 F.2d 1240, at 1242 (9th Cir. 1988) ("The issue of whether the constitutional error ... is harmless is a mixed question of law and fact."); Grizzell v. Wainwright, 692 F.2d 722 at 725 (11th Cir. 1982) ("From decisions in areas involving other types of constitutional errors, it appears that the existence of constitutional harmless error is a mixed question of law and fact..."); contra, United States ex rel. Savory v. Lane, 832 F.2d 1011 at 1018 (7th Cir. 1987) ("At the risk of stating the obvious, we note that whether a constitutional error is harmless is not only a federal question, but one of federal law, and not fact.").

> the facts satisfy the statutory standard, or to put it another way, whether the rule of law as applied to the established facts is or is not violated. There is substantial authority in the Circuits on both sides of this question. (Emphasis added) Compare United States ex rel. Johnson v. Johnson, 531 F.2d 169, 174 n. 12 (CA3 1976); Stafos v. Jarvis, 477 F.2d 369, 372 (CA10 1973); and Johnson v. Salisbury, 448 F.2d 374, 377 (CA8 1970) with Rogers v. Bates, 431 F.2d 16, 18 (CA8 1970); and Pennsylvania Casualty Co. v. McCoy, 167 F.2d 132, 133 (CA5 1948).

456 U.S. 273, 289 n.19 (1982).

Ambiguities in applying Rule 52(a) at various stages of appellate review of mixed questions have continued to this day. Other recent cases in addition to Amadeo, however, strongly suggest that it is error for an appellate court completely to disregard a district court's factfinding, as the panel did in this case. In Strickland v. Washington , 466 U.S. 668, 698 (1984), for example, the Court suggested that the Eleventh Circuit had erred by disregarding Rule 52(a)'s clearly erroneous rule in the context of reviewing a different mixed question of law and fact -- whether trial counsel's performance met minimum Sixth Amendment standards. If the Court's suggestion in Strickland were extended to cover the mixed question of harmless error, the Eleventh Circuit panel would surely be found to have erred in this case as well.

The Court should grant certiorari to clarify the proper role of Rule 52(a) in the appellate review of district court findings on the issue of harmless error.

III.

THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE INTRODUCTION OF A TAINTED CONFESSION CAN BE HARMLESS ERROR

The profound impact which confessions have upon juries was noted by this Court recently in Cruz v. New York:

> "The defendant's own confession is probably the most probative and damaging evidence that can be admitted against him. Though itself an out-of-court statement, it is admitted as reliable evidence because it is an admission of guilt by the defendant and constitutes direct evidence of the facts to which it relates. Even the testimony of an eyewitness may be less reliable than the defendant's own confession. An observer may not correctly perceive, understand, or remember the acts of another, but the admissions of a defendant come from the actor himself, the most knowledgeable and unimpeachable source of information about his past conduct." [Bruton v. United States, 391 U.S. 123], 139-40 (1968). Confessions of defendants have profound impact on juries, so much that we held in Jackson v. Denno . . . that there is justifiable doubt that juries will disregard them even if told to do so.

481 U.S. 186, 195 (1987) (White, J., dissenting)

The panel decision ignored this fundamental insight on the evidentiary power of confessions; it concluded instead that because McCleskey's confession was "not developed at length" during the trial testimony, its admission was harmless error. (App. C, 890 F.2d at 353).

The panel's conclusion runs contrary to this Court's recognition of the substantial qualitative difference in jury impact between confessions and other evidence. The fact that McCleskey's ostensible jailhouse "confession" was not a lengthy one did not diminish its impact on his jury. Indeed, as this Court's precedents make clear, Offie Evans' brief statement that

McCleskey had admitted he was the triggerman, and that McCleskey said he would have killed a dozen officers had it been necessary, need not have been a word longer to have had a dramatic effect.

The panel nonetheless concluded that there was "no reasonable likelihood that the jury's imposition of the death penalty was affected by Evans' testimony." The conclusion simply does not comport with this Court's teachings. Offie Evans' dramatic account of McCleskey's "jailhouse confession" came at the very close of the guilt trial. The State produced only a single additional witness and then began its closing argument. Evans' testimony, therefore, was fresh in the jury's mind at the time of its deliberations, both on guilt and penalty (since no evidence whatsoever was presented at the penalty phase). Evans' testimony played a singular role. No other witness was apparently disinterested and possessed with such important testimony.[18] As this Court noted recently in

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[18] The panel also made reference to the prior judgment of the en banc Eleventh Circuit, which dismissed in 1986, as harmless error, McCleskey's earlier constitutional claim under Giglio. (Although McCleskey had proven on his initial federal application that the State had failed to reveal a promise made to Offie Evans in exchange for his testimony, the en banc court found the error to be harmless.) (App. C, 890 F.2d at 351).

The panel acknowledged that this earlier holding "occurred in the context of McCleskey's Giglio claim," but it nonetheless concluded that the holding "clearly has bearing on the import of Evans' testimony in the context of McCleskey's Massiah claim." (Id.)

What apparently escaped the panel in making this comparison is that the evidentiary impact of these two violations is dramatically different for harmless error purposes. Giglio simply holds that a jury should have heard, in addition to all of Offie Evans' damaging testimony about McCleskey's jailhouse

Satterwhite v. Texas, 486 U.S. 249 (1988), the testimony of a singular, disinterested witness on a critical issue at the penalty phase of a capital trial is rarely, if ever, harmless error.

The panel's holding that an unconstitutionally-obtained confession could not have affected the jury's deliberations, either at the guilt or penalty phase, is contrary to applicable decisions of this Court, and certiorari should be granted to review it.

CONCLUSION

The petition for certiorari should be granted.

Dated: March 23, 1990

Respectfully submitted,

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"confession," one additional piece of information: that Evans was testifying in exchange for a promise. Massiah, by contrast, holds that Offie Evans' entire testimony about Warren McCleskey's "confession" should never have been heard at all. To confound the likely harm to Warren McCleskey from these very different constitutional violations is an error sufficiently serious to cast the panel's entire judgment on this point into the gravest doubt.

APPENDIX A

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Warren McCleskey
Petitioner

vs. CIVIL ACTION NO. 1:87-cv-1517-JOF

Ralph M. Kemp, Warden
Respondent

JUDGMENT

The Court, Honorable J. OWEN FORRESTER, United States District Judge, by order of this date, having GRANTING the petition for a writ of habeas corups, DIRECTING, the petitioner to re-try defendant within 120 days from receipt of the 12/23/87 order.

JUDGMENT is hereby entered in favor of the ~~respondent(s)~~ petitioner and against the ~~petitioner(s)~~ respondent.

Dated at Atlanta, Georgia, this 15 day of January, 1988.
with permission of the court Nunc pro tunc for December 23, 1987.

LUTHER D. THOMAS, Clerk

By: _____
Deputy Clerk

FILED AND ENTERED
IN CLERK'S OFFICE
January 13, 1987
LUTHER D. THOMAS, Clerk

By: _____
Deputy Clerk

FILED IN CLERK'S OFFICE
U.S.D.C. - Atlanta

DEC 23 1987

LUTHER D. THOMAS, Clerk
By: _____ Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

WARREN McCLESKEY,
Petitioner,

vs. CIVIL ACTION NO. C87-1517A

RALPH M. KEMP, Superintendent
Georgia Diagnostic and
Classification Center,
Respondent.

ORDER

I. INTRODUCTION.

Petitioner Warren McCleskey, convicted and sentenced to death in October 1978 for the murder of Police Officer Frank Schlatt during the course of a furniture store robbery,[1] petitions this court for a writ of habeas corpus on seven separate grounds: (1) that the state's non-disclosure of critical impeachment evidence violated his due process rights (the Giglio claim); (2) that his capital sentence was the product of intentional racial discrimination in violation of his eighth amendment and equal protection rights (the intentional discrimination claim); (3) that the trial court's denial of funds to employ experts in his defense violated his due process rights (the Ake claim); (4) that the use of the petitioner's alleged statements to a jailhouse informant violated his sixth amendment and due process rights (the Massiah claim); (5) that the state's failure to correct a

witness's misleading testimony violated his eighth amendment and due process rights (the Mooney claim); (6) that the state's reference to appellate review in its closing argument violated his eighth amendment and due process rights (the Caldwell claim); and (7) that the state's systematic exclusion of black jurors violated his sixth amendment and equal protection rights (the Batson claim).

For the reasons discussed below, the petition for a writ of habeas corpus will be granted as to the Massiah claim but denied as to all other claims. In Part II of this order the court will detail the history of the petitioner's efforts to avoid the death penalty. Then, because the successive nature of this petition dominates the court's discussion and will be dispositive of many of the issues raised by the petition, Part III will set out the general principles of finality in habeas corpus actions. Next, the court will address each of the seven claims raised in this petition; first, the successive claims in Part IV (the Giglio, intentional discrimination, and Ake claims) and then the new claims in Part V (the Massiah, Mooney, Caldwell, and Batson claims). Finally, in Part VI, the court will address the petitioner's other pending motions -- a motion for discovery and a motion to exceed page limits.

II. HISTORY OF PRIOR PROCEEDINGS.

The petitioner was convicted and sentenced in the Superior Court of Fulton County on October 12, 1978. The convictions and sentences were affirmed by the Supreme Court of Georgia.

McCleskey v. State, 245 Ga. 108 (1980). The United States Supreme Court then denied a petition for certiorari, McCleskey v. Georgia, 449 U.S. 891 (1980). On December 19, 1980, the petitioner filed an extraordinary motion for a new trial in Fulton County Superior Court, but no hearing has ever been held on that motion. On January 5, 1981 the petitioner filed a petition for writ of habeas corpus in the Butts County Superior Court. On April 8, 1981, that court denied all relief. On June 17, 1981 the Georgia Supreme Court denied the petitioner's application for a certificate of probable cause to appeal. The United States Supreme Court again denied a petition for a writ of certiorari. McCleskey v. Zant, 454 U.S. 1093 (1981).

McCleskey filed his first federal habeas corpus petition in this court on December 30, 1981. This court held an evidentiary hearing in August and October 1983 and granted habeas corpus relief on one issue on February 1, 1984. McCleskey v. Zant, 580 F. Supp. 338 (N.D.Ga. 1984). The Eleventh Circuit reversed and denied the habeas corpus petition on January 29, 1985. McCleskey v. Kemp, 753 F.2d 877 (11th Cir. 1985) (en banc). This time the United States Supreme Court granted certiorari and affirmed the Eleventh Circuit on April 22, 1987. McCleskey v. Kemp, ___ U.S. ___, 107 S.Ct. 1756, petition for rehearing denied, ___ U.S. ___, 107 S.Ct. 3199 (1987). McCleskey filed a successive petition for a writ of habeas corpus in the Butts County Superior Court on June 9, 1987, and a First Amendment to the Petition on June 22, 1987 (Civil Action No. 87-V-1028). That court granted the

state's motion to dismiss the petition on July 1, 1987. The Georgia Supreme Court denied the petitioner's application for a certificate of probable cause to appeal on July 7, 1987 (Application No. 4103).

This court issued an order on June 16, 1987 making the mandate of the Eleventh Circuit the judgment of this court and lifting the stay of execution that had been entered when the first federal habeas corpus petition was filed. On July 7, 1987 McCleskey filed the present petition for a writ of habeas corpus, a request to proceed in forma pauperis, a motion for discovery, and a motion for a stay of execution. The court granted the request to proceed in forma pauperis and held an evidentiary hearing on the petition on July 8 and 9, 1987. At that time, the court granted the motion for a stay of execution. The court took further evidence in a hearing on August 10, 1987 and, at the close of the evidence, requested post-hearing briefs from the parties. Those briefs have since been filed and the petitioner's claims are ripe for determination.

III. THE DOCTRINE OF FINALITY IN HABEAS CORPUS PETITIONS.

Although successive petitions for a writ of habeas corpus are not subject to the defense of res judicata, Congress and the courts have fashioned a "modified doctrine of finality" which precludes a determination of the merits of a successive petition under certain circumstances. Bass v. Wainwright, 675 F.2d 1204, 1206 (11th Cir. 1982). In particular, Congress has authorized the federal courts to decline to address the merits of a petition

if the claims contained therein were decided upon the merits previously or if any new grounds for relief that are asserted should have been raised in the previous petition. 28 USC §2244(a) & (b). The habeas rules have described these distinct applications of the doctrine of finality as follows:

> A second or successive petition may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ.

28 USC foll. §2254, Rule 9(b).

A purely successive petition or successive claim raises issues which have been decided adversely on a previous petition. The court may take judicial notice of allegations raised by a previous petition. See Allen v. Newsome, 795 F.2d 934, 937 (11th Cir. 1986). Rule 9(b) requires that the issue raised by the previous petition must have been decided adversely to the petitioner on the merits before the doctrine of finality obtains. A merits determination need not be a determination made after an evidentiary hearing if the facts material to the successive claim were undisputed at the time of the previous petition. Bass, 675 F.2d at 1206.

A truly successive petition may be distinguished from the second category of petitions subject to the finality doctrine: petitions alleging new claims that may be an "abuse of the writ." 28 USC §2244(b); 28 USC foll. §2254, Rule 9(b). The state has

the burden of pleading abuse of the writ; the burden then shifts to the petitioner to show that he has not abused the writ. Price v. Johnston, 334 U.S. 266, 292-93 (1948); see also Allen v. Newsome, 795 F.2d 934, 938-39 (11th Cir. 1986). To meet his burden, a petitioner must "give a good excuse for not having raised his claims previously." Allen 794 F.2d at 939. An evidentiary hearing on an abuse of the writ defense is not necessary if the record affords an adequate basis for decision. Price, 334 U.S. at 292-93.

As this circuit has articulated the issue presented by an abuse of the writ defense, "[a] district court need not consider a claim raised for the first time in a second habeas petition, unless the petitioner establishes that the failure to raise the claim earlier was not the result of intentional abandonment or withholding or inexcusable neglect." Adams v. Dugger, 816 F.2d 1493, 1494 (11th Cir. 1987) (citations omitted). See also Moore v. Kemp, 824 F.2d 847, 851 (11th Cir. 1987). There are a number of instances in which failure to raise an issue in a prior petition is excusable. "A retroactive change in the law and newly discovered evidence are examples." 28 USC foll. §2254, Rule 9 Advisory Committee Notes. See, e.g., Ritter v. Thigpen, 828 F.2d 662, 665 (11th Cir. 1987); Adams, 816 F.2d at 1495. Of course, failure to discover evidence supportive of a claim prior to the first petition may itself constitute inexcusable neglect or

deliberate bypass. Cf. Freeman v. Georgia, 599 F.2d 65, 71-72 (5th Cir. 1979) (no procedural default where petitioner was misled by police and could not have uncovered evidence supportive of a claim in any event).[2]

Even if a particular claim is truly successive or, if it is a new claim, is an abuse of the writ, a court may consider the merits of the claim if "the ends of justice" would be served thereby. See Sanders v. United States, 373 U.S. 1, 16 (1963) (successive claim); id. at 18 (new claim); Smith v. Kemp, 715 F.2d 1459, 1468 (11th Cir. 1983) (successive claim); Moore v. Kemp 824 F.2d at 856 (new claim). The burden is upon the petitioner to show that the ends of justice would be served. Sanders, 373 U.S. at 17.

The "ends of justice" exception has been subject to differing interpretations. The Court in Sanders suggested some circumstances in which the "ends of justice" would be served by re-visiting a successive claim:

> If factual issues are involved, the applicant is entitled to a new hearing upon a showing that the evidentiary hearing on the prior application was not full and fair; we canvassed the criteria of a full and fair evidentiary hearing recently in Townsend v. Sain, [372 U.S. 293 (1963)], and that discussion need not be repeated here. If purely legal questions are involved, the applicant may be entitled to a new hearing upon showing an intervening change in the law or some other justification for having failed to raise a crucial point or argument in the prior application. ... [T]he foregoing enumeration is not intended to be exhaustive; the test is "the ends of justice" and it cannot be too finely particularized.

373 U.S. at 16-17. This circuit has traditionally followed the Sanders articulation of the "ends of justice" exception. See, e.g., Moore v. Kemp, 824 F.2d at 856; Smith v. Kemp, 715 F.2d at 1468.

A plurality of the Supreme Court recently challenged this open-ended definition of "the ends of justice," arguing that a successive claim should not be addressed unless the petitioner "supplements his constitutional claim with a colorable showing of factual innocence." Kuhlmann v. Wilson, ___ U.S. ___, 106 S.Ct. 2616, 2627 (1986) (Opinion of Powell, J., joined by Burger, Rehnquist, and O'Connor, JJ.). Under this definition of the "ends of justice," the petitioner "must make his evidentiary showing even though ... the evidence of guilt may have been unlawfully admitted." Id. That is, petitioner must "show a fair probability that, in light of all the evidence, including that alleged to have been illegally admitted (but with due regard to any unreliability of it) and evidence tenably claimed to have been wrongfully excluded or to have become available only after trial, the trier of facts would have entertained a reasonable doubt of his guilt." Id. n. 17 (quoting Friendly, Is Innocence Irrelevant? Collateral Attack on Criminal Judgments, 38 U.Chi.L.Rev. 142 (1970)).

Following Kuhlmann, "[i]t is not certain what standards should guide a district court in determining whether the 'ends of justice' require the consideration of an otherwise dismissable successive habeas petition." Moore, 824 F.2d at 856. The

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Eleventh Circuit, in Moore, declined to decide "whether a colorable showing of factual innocence is a necessary condition for the application of the ends of justice exception." Id. The court merely held that, "at a minimum, the ends of justice will demand consideration of the merits of a claim on a successive petition where there is a colorable showing of factual innocence." Id.

IV. PETITIONER'S SUCCESSIVE CLAIMS.

Three of the petitioner's claims in this second federal habeas petition duplicate claims in the first federal petition and are therefore truly successive claims that should be dismissed according to the dictates of Rule 9(b) unless the petitioner can show that the "ends of justice" justify re-visiting the claims. Each claim will be discussed in turn.

A. Giglio Claim.

Petitioner's Giglio claim is based upon the state's failure to disclose its agreement with a witness, Offie Evans, which led him to testify against petitioner at trial. McCleskey argues that the state's failure to disclose the promise by a police detective to "speak a word" for Offie Evans with regard to an escape charge violated McCleskey's due process rights under Giglio v. United States, 405 U.S. 150 (1971). Giglio held that failure to disclose the possible interest of a government witness will entitle a defendant to a new trial if there is a reasonable likelihood that the disclosure would have affected the judgment of the jury. Id. at 154. This court granted habeas corpus

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relief on this claim in passing upon the first federal habeas petition, but the Eleventh Circuit reversed en banc. McCleskey v. Zant, 580 F. Supp. at 380-84, rev'd sub nom. McCleskey v. Kemp, 753 F.2d at 885.

McCleskey argues that the ends of justice require re-visiting his Giglio claim for three reasons. He argues that the discovery of a written statement by Offie Evans provides new evidence of a relationship between Offie Evans and the state supportive of a finding of a quid pro quo for Offie Evans' testimony. He also proffers the affidavit testimony of jurors who indicate that they might have reached a different verdict had they known the real interest of Offie Evans in testifying against petitioner. Finally, petitioner contends that there has been a change in the law regarding the materiality standard for a finding of a Giglio violation.

None of these arguments is sufficient to justify re-visiting the Giglio claim. The written statement of Offie Evans offers no new evidence of an agreement by state authorities to do Offie Evans a favor if he would testify against petitioner. Consequently, the conclusion of the Eleventh Circuit that the detective's promise did not amount to a promise of leniency triggering Giglio is still valid. See McCleskey v. Kemp, 753 F.2d at 885. Because the threshold showing of a promise still has not been made, the ends of justice would not be served by allowing petitioner to press this claim again.

Petitioner also has no newly discovered evidence with respect to the materiality of the state's failure to disclose its arrangement with Offie Evans. The affidavit testimony of the jurors is not evidence that petitioner could not have obtained at the time of the first federal habeas petition. In any event, a juror is generally held incompetent to testify in impeachment of a verdict. Fed. R. Evid. 606(b); Proffitt v. Wainwright, 685 F.2d 1227, 1255 (11th Cir. 1982). See generally McCormick on Evidence §608 (3d Ed. 1984).

Finally, petitioner can point to no change in the law on the standard of materiality. The Eleventh Circuit concluded in this case that there was "no 'reasonable likelihood' that the State's failure to disclose the detective's [promise] affected the judgment of the jury." McCleskey, 753 F.2d at 884. The same standard still guides this circuit in its most recent decisions on the issue. See, e.g., United States v. Burroughs, No. 86-3566, Slip Op. at 381 (11th Cir., Nov. 3, 1987); Brown, 785 F.2d at 1464 (citing McCleskey v. Kemp, 753 F.2d at 885).

B. Intentional Discrimination Claim.

Having lost in the Supreme Court[3] on his contentions regarding the Baldus Study, the petitioner nevertheless trotted it out to support the more narrow contention that McCleskey was singled out both because he is black and because his victim was white.

The Baldus Study is said to be the most ambitious yet. It is. The part of it that is ambitious, however -- the 230-variable model structured and validated by Dr. Baldus -- did not adduce one smidgen of evidence that the race of the defendants or the race of the victims had any effect on the Georgia prosecutors' decisions to seek the death penalty or the juries' decisions to impose it. The model that Dr. Baldus testified accounted for all of the neutral variables did not produce any "death-odds multiplier" of 4 or 6 or 11 or 14 or any of the other numbers which the media have reported.

To be sure, there are some exhibits that would show discrimination and do contain such multipliers. But these were not produced by the "ambitious" 230-variable model of the study. The widely-reported "death-odds multipliers" were produced instead by arbitrarily structured little rinky-dink regressions that accounted for only a few variables. They are of the sort of statistical analysis given short shrift by courts and social scientists alike in the past. They prove nothing other than the truth of the adage that anything may be proved by statistics.

The facts are that the only evidence of over-zealousness or improprieties by any person(s) in the law enforcement establishment points to the black case officers of the Atlanta Bureau of Police Services,[4] which was then under the leadership of a black superior who reported to a black mayor in a majority black city. The verdict was returned by a jury on which a black person sat and, although McCleskey has adduced affidavits from jurors on

other subjects, there is no evidence that the black juror voted for conviction and the death penalty because she was intimidated by the white jurors. It is most unlikely that any of these black citizens who played vital roles in this case charged, convicted or sentenced McCleskey because of the racial considerations alleged.

There is no other evidence that race played a part in this case.

C. Ake Claim.

Petitioner's last truly successive claim is based upon the trial court's denial of his request for the provision of funds for experts, particularly for a ballistics expert. Petitioner alleges that this ruling by the trial court denied him his right to due process of law as guaranteed by the fourteenth amendment. Petitioner raised this same claim in the first federal habeas petition and this court held that the claim was without merit. McCleskey v. Zant, 580 F. Supp. at 388-89 (citing Moore v. Zant, 722 F.2d 640 (11th Cir. 1983)). At that time the law held that the appointment of experts was generally a matter within the discretion of the trial judge and could not form the basis for a due process claim absent a showing that the trial judge's decision rendered the defendant's trial fundamentally unfair. Moore, 722 F.2d at 648. With that case law in mind, this court concluded that the state trial court had not abused its discretion because the petitioner had the opportunity to subject

the state's ballistics expert to cross-examination and because there was no showing of bias or incompetence on the part of the state's expert. McCleskey v. Zant, 580 F. Supp. at 389.

Arguing that the ends of justice require re-visiting the claim, petitioner points to the cases of Ake v. Oklahoma, 470 U.S. 68, 83 (1985) and Caldwell v. Mississippi, 472 U.S. 320, 323 n. 1 (1985) (plurality), as examples of a change in the law regarding the provision of experts. It may be that these cases did change the law; this matter, which was traditionally thought to rest within the discretion of state trial judges, now has heightened constitutional significance. Compare Moore v. Zant, 722 F.2d at 648, with Moore v. Kemp, 809 F.2d 702, 709-12 (11th Cir. 1987).

Even so, this new law does not justify re-visiting this claim. The new Supreme Court cases require "that a defendant must show the trial court that there exists a reasonable probability both that an expert would be of assistance to the defense and that denial of expert assistance would result in a fundamentally unfair trial. Thus, if a defendant wants an expert to assist his attorney in confronting the prosecution's proof ... he must inform the court of the nature of the prosecution's case and how the requested expert would be useful." Moore v. Kemp, 809 F.2d at 712. A review of the state trial record indicates that petitioner did nothing more than generally refer to the extensive expert testimony available to the state. Petitioner then specifically requested the appointment of a psychiatric expert.

The petitioner never specifically requested the appointment of a ballistics expert, nor did he make the showing that this circuit has held is required by Ake and Caldwell. The state trial court could hardly have been expected to appreciate the importance of a ballistics expert to petitioner's case if petitioner himself neither requested such an expert nor explained the significance of such an expert to the court.

V. PETITIONER'S NEW CLAIMS.

A. Massiah Claim.

1. Findings of Fact.

Petitioner relies primarily on the testimony of Ulysses Worthy before this court and the recently disclosed written statement of Offie Evans to support his Massiah claim. Ulysses Worthy, who was captain of the day watch at the Fulton County Jail during the summer of 1978 when petitioner was being held there awaiting his trial for murder and armed robbery, testified before this court on July 9 and August 10, 1987. The court will set out the pertinent parts of that testimony and then summarize the information it reveals.

On July 9, Worthy testified as follows: He recalled "something being said" to Evans by Police Officer Dorsey or another officer about engaging in conversations with McCleskey (II Tr. 147-49).[5] He remembered a conversation, where Detective Dorsey and perhaps other officers were present, in which Evans was asked to engage in conversations with McCleskey (II Tr. 150).

Later, Evans requested permission to call the detectives (II Tr. 151). Assistant District Attorney Russell Parker and Detective Harris used Worthy's office to interview Evans at one point, which could have been the time they came out to the jail at Evans' request (Id.).

In other cases, Worthy had honored police requests that someone be placed adjacent to another inmate to listen for information (II Tr. 152); such requests usually would come from the officer handling the case (Id.); he recalled specifically that such a request was made in this case by the officer on the case (II Tr. 153). Evans was put in the cell next to McCleskey at the request of the officer on the case (Id.); "someone asked [him] to specifically place Offie Evans in a specific location in the Fulton County Jail so he could overhear conversations with Warren McCleskey," but Worthy did not know who made the request and he was not sure whether the request was made when Evans first came into the jail (II Tr. 153-54); he did not recall when he was asked to move Evans (II Tr. 155-56).

On August 10, 1987 Worthy testified as follows: Evans was first brought to his attention when Deputy Hamilton brought Evans to Worthy's office because Evans wanted to call the district attorney or the police with "some information he wanted to pass to them" (III Tr. 14). The first time the investigators on the Schlatt murder case talked to Evans was "a few days" after Evans' call (III Tr. 16-17). That meeting took place in Worthy's office (III Tr. 17). Worthy was asked to move Evans "from one cell to

another" (III Tr. 18). Worthy was "not sure" who asked, "but it would have had ... to have been one of the officers," Deputy Hamilton, or Evans (III Tr. 18-19). Deputy Hamilton asked Worthy to move Evans "perhaps 10, 15 minutes" after Evans' interview with the investigators (III Tr. 20). This was the first and only time Worthy was asked to move Evans (Id.). Deputy Hamilton would have been "one of the ones" to physically move Evans (III Tr. 22). Worthy did not know for a fact that Evans was ever actually moved (Id.). The investigators later came out to interview Evans on other occasions, but not in Worthy's presence (III Tr. 23). Neither Detectives Harris, Dorsey or Jowers nor Assistant District Attorney Parker ever asked Worthy to move Evans (III Tr. 24).

On cross-examination, Worthy re-affirmed portions of his July 9 testimony: He overheard someone ask Evans to engage in conversation with McCleskey at a time when Officer Dorsey and another officer were present (III Tr. 32-33). Evans requested permission to call the investigators after he was asked to engage in conversation with McCleskey (III Tr. 33). Usually the case officer would be the one to request that an inmate be moved and that was the case with Evans, though he does not know exactly who made the request (III Tr. 46-48). Worthy also contradicted portions of his July 9 testimony, stating that the interview at which Assistant District Attorney Parker was present was the first time Evans was interviewed and that Worthy had not met Officer Dorsey prior to that time (III Tr. 36). On further

cross-examination, Worthy testified as follows: Deputy Hamilton was not a case officer but was a deputy at the jail (III Tr. 49). When Worthy testified on July 9 he did not know what legal issues were before the court (III Tr. 52-53). After his July 9 testimony he met with the state's attorneys on two occasions for a total of forty to fifty minutes (III Tr. 53-54). After his July 9 testimony he read a local newspaper article mentioning him (III Tr. 56).

In response to questions from the court, Worthy stated that he was satisfied that he was asked for Evans "to be placed near McCleskey's cell," that "Evans was asked to overhear McCleskey talk about this case," and that Evans was asked to "get some information from" McCleskey (III Tr. 64-65). Worthy maintained that these requests were made on the date that Assistant District Attorney Parker interviewed Evans, but he could not explain why the investigators would have requested a move on the same day that Evans had already told the investigators that he was next to McCleskey, that he had been listening to what McCleskey had been saying, and that he had been asking McCleskey questions (III Tr. 64).

In summary, Worthy never wavered from the fact that someone, at some point, requested his permission to move Evans to be near McCleskey. Worthy's July 9 testimony indicates the following sequence: The request to move Evans, the move, Evans' request to call the investigators, the Parker interview, and other later interviews. Worthy's August 10 testimony indicates a different

sequence: Evans' request to call the investigators, the Parker interview, the request to move Evans by Deputy Hamilton, and other later interviews. Worthy's testimony is inconsistent on Officer Dorsey's role in requesting the move, on whether Deputy Hamilton requested the move, and on whether the request to move Evans preceded Evans' request to call the investigators. Worthy has no explanation for why the authorities would have requested to move Evans after the Parker interview, at which Evans made it clear that he was already in the cell adjacent to McCleskey's.

All of the law enforcement personnel to whom Worthy informed -- Deputy Hamilton, Detectives Dorsey, Jowers and Harris, and Assistant District Attorney Parker -- flatly denied having requested permission to move Evans or having any knowledge of such a request being made (III Tr. 68-71; 80-81, 95; 97-98; 102-03; 111-12, 116). It is undisputed that Assistant District Attorney Parker met with Evans at the Fulton County Jail on only one occasion, July 12, 1978, and that Evans was already in the cell next to McCleskey's at that time (III Tr. 113-14; 71-72).

Petitioner also relies on Evans' twenty-one page statement to the Atlanta Police Department, dated August 1, 1978, in support of his claim that the authorities deliberately elicited incriminating information from him in violation of his sixth amendment right to counsel. Evans' statement relates conversations he overheard between McCleskey and McCleskey's co-defendant DuPree and conversations between himself and McCleskey from July 9 to July 12, 1978. McCleskey's statements during the

course of those conversations were highly incriminating. In support of his argument that the authorities instigated Evans' information gathering, McCleskey points to the methods Evans used to secure McCleskey's trust and thereby stimulate incriminating conversation. Evans repeatedly lied to McCleskey, telling him that McCleskey's co-defendant, Ben Wright, was Evans' nephew; that Evans' name was Charles; that Ben had told Evans about McCleskey; that Evans had seen Ben recently; that Ben was accusing McCleskey of falsely identifying Ben as the "trigger man" in the robbery; that Evans "used to stick up with Ben too;" that Ben told Evans that McCleskey shot Officer Schlatt; and that Evans was supposed to have been in on the robbery himself.

In addition, McCleskey argues that Evans' knowledge that McCleskey and other co-defendants had told police that co-defendant Ben Wright was the trigger person demonstrates Evans' collusion with the police since that fact had not been made public at that time. Finally, McCleskey points to two additional pieces of evidence about Evans' relationship with the police: Evans testified at McCleskey's trial that he had talked to Detective Dorsey about the case before he talked to Assistant District Attorney Parker (Pet. Exh. 16 at 119); and Evans had acted as an informant for Detective Dorsey before (II Tr. 52-3).

The factual issue for the court to resolve is simply stated: Either the authorities moved Evans to the cell adjoining McCleskey's in an effort to obtain incriminating information or they did not. There is evidence to support the argument that

Evans was not moved, that he was in the adjoining cell fortuitously, and that his conversations with McCleskey preceded his contact with the authorities. Worthy's testimony is often confused and self-contradictory, it is directly contrary to the testimony of Deputy Hamilton and Detective Dorsey, it is contrary to Evans' testimony at McCleskey's trial that he was put in the adjoining cell "straight from the street" (Trial Tr. 873), and it is contrary to the opening line of Evans' written statement which says, "I am in the Fulton County Jail cell # 1 north 14 where I have been since July 3, 1978 for escape." Worthy himself testified that escape risks where housed in that wing of the jail (III Tr. 13-14). Moreover, the use of Evans as McCleskey alleges, if it occurred, developed into a complicated scheme to violate McCleskey's constitutional rights -- its success required Evans and any officers involved to lie and lie well about the circumstances. For these reasons, the state asks this court to reject Worthy's testimony that someone requested permission to move Evans next to McCleskey's cell.

After carefully considering the substance of Worthy's testimony, his demeanor, and the other relevant evidence in this case, the court concludes that it cannot reject Worthy's testimony about the fact of a request to move Offie Evans. The fact that someone, at some point, requested his permission to move Evans is the one fact from which Worthy never wavered in his two days of direct and cross-examination. The state has introduced no affirmative evidence that Worthy is either lying or mistaken.

The lack of corroboration by other witnesses is not surprising; the other witnesses, like Assistant District Attorney Parker, had no reason to know of a request to move Evans or, like Detective Dorsey, had an obvious interest in concealing any such arrangement. Worthy, by contrast, had no apparent interest or bias that would explain any conscious deception. Worthy's testimony that he was asked to move Evans is further bolstered by Evans' testimony that he talked to Detective Dorsey before he talked to Assistant District Attorney Parker and by Evans' apparent knowledge of details of the robbery and homicide known only to the police and the perpetrators.

Once it is accepted that Worthy was asked for permission to move Evans, the conclusion follows swiftly that the sequence of events to which Worthy testified originally must be the correct sequence; i.e., the request to move Evans, the move, Evans' request to call the investigators, the Parker interview, and other later interviews. There are two other possible conclusions about the timing of the request to move Evans, but neither is tenable. First, the request to move Evans could have come following Evans' meeting with Assistant District Attorney Parker, as Worthy seemed to be testifying on August 10 (III Tr. 20). However, a request at that point would have been nonsensical because Evans was already in the cell adjoining McCleskey's. Second, it could be that Evans was originally in the cell next to McCleskey, that he overheard the incriminating statements prior to any contact with the investigators, that

McCleskey was moved to a different cell, and that the authorities then requested permission to move Evans to again be adjacent to McCleskey. As the state concedes, this possibility is mere speculation and is not supported by any evidence in the record. Post-Hearing Brief at 53.

For the foregoing reasons, the court concludes that petiticner has established by a preponderance of the evidence the following sequence of events: Evans was not originally in the cell adjoining McCleskey's; prior to July 9, 1978, he was moved, pursuant to a request approved by Worthy, to the adjoining cell for the purpose of gathering incriminating information; Evans was probably coached in how to approach McCleskey and given critical facts unknown to the general public; Evans engaged McCleskey in conversation and eavesdropped on McCleskey's conversations with DuPree; and Evans reported what he had heard between July 9 and July 12, 1978 to Assistant District Attorney Parker on July 12.

2. Abuse of the Writ Questions.

The state argues that petitioner's Massiah claim in this second federal habeas petition is an abuse of the writ because he intentionally abandoned the claim after his first state habeas petition and because his failure to raise this claim in his first federal habeas petition was due to inexcusable neglect. As was noted earlier, the burden is on petitioner to show that he has not abused the writ. Allen, 795 F.2d at 938-39. The court concludes that petitioner's Massiah claim is not an abuse of the writ.

First, petitioner cannot be said to have intentionally abandoned this claim. Although petitioner did raise a Massiah claim in his first state petition, that claim was dropped because it was obvious that it could not succeed given the then-known facts. At the time of his first federal petition, petitioner was unaware of Evans' written statement, which, as noted above, contains strong indications of an ab initio relationship between Evans and the authorities. Abandoning a claim whose supporting facts only later become evident is not an abandonment that "for strategic, tactical, or any other reasons ... can fairly be described as the deliberate by-passing of state procedures." Fay v. Noia, 372 U.S. 391, 439 (1963), quoted in Potts v. Zant, 638 F.2d 727, 743 (5th Cir. 1981). Petitioner's Massiah claim is therefore not an abuse of the writ on which no evidence should have been taken. This is not a case where petitioner has reserved his proof or deliberately withheld his claim for a second petition. Cf. Sanders v. United States, 373 U.S. 1, 18 (1963). Nor is the petitioner now raising an issue identical to one he earlier considered without merit. Cf. Booker v. Wainwright, 764 F.2d 1371, 1377 (11th Cir. 1985).

Second, petitioner's failure to raise this claim in his first federal habeas petition was not due to his inexcusable neglect. When the state alleges inexcusable neglect, the focus is on "the petitioner's conduct and knowledge at the time of the preceding federal application. ... He is chargeable with counsel's actual awareness of the factual and legal bases of the

claim at the time of the first petition and with the knowledge that would have been possessed by reasonably competent counsel at the time of the first petition." Moore, 824 F.2d at 851. Here, petitioner did not have Evans' statement or Worthy's testimony at the time of his first federal petition; there is therefore no inexcusable neglect unless "reasonably competent counsel" would have discovered the evidence prior to the first federal petition. This court concluded at the evidentiary hearing that petitioner's counsel's failure to discover Evans' written statement was not inexcusable neglect (I Tr. 118-19). The same is true of counsel's failure to discover Worthy's testimony. Petitioner's counsel represents, and the state has not disputed, that counsel did conduct an investigation of a possible Massiah claim prior to the first federal petition, including interviewing "two or three jailers." Petitioner's Post-Hearing Reply Brief at 5. The state has made no showing of any reason that petitioner or his counsel should have known to interview Worthy specifically with regard to the Massiah claim. The state argues that petitioner's counsel should have at least interviewed Detectives Harris and Dorsey and Deputy Hamilton. Given that all three denied any knowledge of a request to move Evans next to McCleskey, it is difficult to see how conducting such interviews would have allowed petitioner to assert this claim any earlier. See Ross v. Kemp, 785 F.2d 1467, 1478 (11th Cir. 1986) (remanding for evidentiary hearing on

inexcusable neglect where petitioner's counsel may have relied on misrepresentations by the custodian of the relevant state records).

In short, the petitioner's Massiah claim as it is currently framed is not an abuse of the writ because it is distinct from the Massiah claim originally raised in his first state petition and because it is based on new evidence. Petitioner's failure to discover this evidence earlier was not due to inexcusable neglect. Because this claim is not an abuse of the writ it is not a successive petition under section 2244(b) and therefore the court need not inquire whether the petitioner has made a colorable showing of factual innocence, if that showing is now the equivalent of the "ends of justice." Fuhlmann, 106 S.Ct. at 2628 n. 18.

3. Conclusions of Law.

The Eleventh Circuit recently summarized the petitioner's burden in cases such as this:

> In order to establish a violation of the Sixth Amendment in a jailhouse informant case, the accused must show (1) that a fellow inmate was a government agent; and (2) that the inmate deliberately elicited incriminating statements from the accused.

Lightbourne v. Dugger, 829 F.2d 1012, 1023 (11th Cir. 1987). The coincidence of similar elements first led the Supreme Court to conclude that such a defendant was denied his sixth amendment right to assistance of counsel in Massiah v. United States, 377 U.S. 201 (1964). In that case, the defendant's confederate

cooperated with the government in its investigation and allowed his automobile to be "bugged." The confederate subsequently had a conversation in the car with the defendant during which the defendant made incriminating statements. The confederate then testified about the defendant's statements at the defendant's trial. The Supreme Court held that the defendant had been "denied the basic protections of [the sixth amendment] when it was used against him at his trial evidence of his own incriminating words, which federal agents had deliberately elicited from him after he had been indicted and in the absence of his counsel." Id. at 206.[6]

The Supreme Court applied its ruling in Massiah to the jailhouse informant situation in United States v. Henry, 447 U.S. 264 (1980). In that case, a paid informant for the FBI happened to be an inmate in the same jail in which defendant Henry was being held pending trial. An investigator instructed the informant inmate to pay particular attention to statements made by the defendant, but admonished the inmate not to solicit information from the defendant regarding the defendant's indictment for bank robbery. The inmate engaged the defendant in conversations regarding the bank robbery and subsequently testified at trial against the defendant based upon these conversations. The Supreme Court held that the inmate had deliberately elicited incriminating statements by engaging the defendant in conversation about the bank robbery. Id. at 271. It

was held irrelevant under Massiah whether the informant questioned the defendant about the crime or merely engaged in general conversation which led to the disclosure of incriminating statements about the crime. Id. at 271-72 n. 10. Although the government insisted that it should not be held responsible for the inmate's interrogation of the defendant in light of its specific instructions to the contrary, the Court held that employing a paid informant who converses with an unsuspecting inmate while both are in custody amounts to "intentionally creating a situation likely to induce [the defendant] to make incriminating statements without the assistance of counsel." Id. at 274.[7]

Given the facts established earlier, petitioner has clearly established a Massiah violation here. It is clear from Evans' written statement that he did much more than merely engage petitioner in conversation about petitioner's crimes. As discussed earlier, Evans repeatedly lied to petitioner in order to gain his trust and to draw him into incriminating statements. Worthy's testimony establishes that Evans, in eliciting the incriminating statements, was acting as an agent of the state. This case is completely unlike Kuhlmann v. Wilson, 106 S.Ct. 2616 (1986), where the Court found no Massiah violation because the inmate informant had been a passive listener and had not deliberately elicited incriminating statements from the defendant.

Here, Evans was even more active in eliciting incriminating statements than was the informant in Henry. The conclusion is inescapable that petitioner's sixth amendment rights, as interpreted in Massiah, were violated.

However, "[n]ot every interrogation in violation of the rule set forth in Massiah ... mandates reversal of a conviction." United States v. Kilrain, 566 F.2d 979, 982 (5th Cir. 1978). Instead, "the proper rule [is] one of exclusion of tainted evidence rather than a per se standard of reversal if any constitutional violation ha[s] occurred." Id. n. 3, citing Brewer v. Williams, 430 U.S. 387, 407 n. 12 (1977); United States v. Hayles, 471 F.2d 788, 793, cert. denied, 411 U.S. 969 (5th Cir. 1973). In other words, "certain violations of the right to counsel may be disregarded as harmless error." United States v. Morrison, 449 U.S. 361, 365 (1981), citing Chapman v. California, 386 U.S. 18, 23 n. 8 (1967). To avoid reversal of petitioner's conviction the state must "prove beyond a reasonable doubt that the error complained of [the use at petitioner's trial of his own incriminating statements obtained in violation of his sixth amendment rights] did not contribute to the verdict obtained." Chapman, 386 U.S. at 24. See also Brown v. Dugger, No. 85-6082, Slip Op. at 511-12 (11th Cir. November 13, 1987).

Once the fact of the Massiah violation in this case is accepted, it is not possible to find that the error was harmless. A review of the evidence presented at the petitioner's trial

reveals that Evans' testimony about the petitioner's incriminating statements was critical to the state's case. There were no witnesses to the shooting and the murder weapon was never found. The bulk of the state's case against the petitioner was three pronged: (1) evidence that petitioner carried a particular gun on the day of the robbery that most likely fired the fatal bullets; (2) testimony by co-defendant Ben Wright that petitioner pulled the trigger; and (3) Evans' testimony about petitioner's incriminating statements. As petitioner points out, the evidence on petitioner's possession of the gun in question was conflicting and the testimony of Ben Wright was obviously impeachable.[8] The state also emphasizes that Evans testified only in rebuttal and for the sole purpose of impeaching McCleskey's alibi defense. But the chronological placement of Evans' testimony does not dilute its impact -- "merely" impeaching the statement "I didn't do it" with the testimony "He told me he did do it" is the functional equivalent of case in chief evidence of guilt.

For the foregoing reasons, the court concludes that petitioner's sixth amendment rights, as interpreted in Massiah, were violated by the use at trial of Evans' testimony about the petitioner's incriminating statements because those statements were deliberately elicited by an agent of the state after petitioner's indictment and in the absence of petitioner's attorney. Because the court cannot say, beyond a reasonable doubt, that the jury would have convicted petitioner without

Evans' testimony about petitioner's incriminating statements, petitioner's conviction for the murder of Officer Schlatt must be reversed pending a new trial.[9]

Unfortunately, one or more of those investigating Officer Schlatt's murder stepped out of line. Determined to avenge his death, the investigator(s) violated clearly-established case law, however artificial or ill-conceived it might have appeared. In so doing, the investigator(s) ignored the rule of law that Officer Schlatt gave his life in protecting and thereby tainted the prosecution of his killer.

B. Mooney Claim.

Petitioner's Mooney claim is based upon the state's use at trial of misleading testimony by Offie Evans, which petitioner contends violated his eighth amendment rights and his right to due process of law under the fourteenth amendment. See Mooney v. Holohan, 294 U.S. 103, 112 (1935) (criminal conviction may not be obtained using testimony known to be perjured). In particular, petitioner contends that the state failed to correct Evans' misleading testimony regarding his real interest in testifying against petitioner, regarding the circumstances surrounding his cooperation with the state, and regarding petitioner's confession of having shot Officer Schlatt. Petitioner alleges that the newly discovered statement of Offie Evans reveals these misleading elements of Offie Evans' testimony at trial.

Petitioner's allegation that the state misled the jury with Offie Evans' testimony that he was a disinterested witness is actually a restatement of petitioner's Giglio claim. The allegation that the state misled the jury with Offie Evans' testimony that he happened to inform the state of petitioner's incriminating statements, when in fact the evidence suggests that Offie Evans may have been an agent of the state, is a restatement of petitioner's Massiah claim. Consequently, only the allegations of misleading testimony regarding the actual shooting need to be addressed as allegations supportive of a separate Mooney claim.

As a preliminary matter, the failure of petitioner to raise this claim in his first federal habeas petition raises the question of abuse of the writ. Because this claim is based upon the newly discovered statement of Offie Evans, the same conclusion reached as to the Massiah claim obtains for this claim. It was not an abuse of the writ to fail to raise the Massiah claim earlier and it was not an abuse of the writ to have failed to raise this claim earlier.

However, on its merits the claim itself is unavailing. In order to prevail on this claim, petitioner must establish that the state did indeed use false or misleading evidence and that the evidence was "material" in obtaining petitioner's conviction or sentence or both. Brown v. Wainwright, 785 F.2d 1457, 1465 (11th Cir. 1986). The test for materiality is whether there is "any reasonable likelihood that the false testimony could have

affected the judgment of the jury." Id. at 1465-66 (quoting United States v. Bagley, ___ U.S. ___, 105 S.Ct. 3375, 3382 (1985) (plurality)). Petitioner's allegations of misleading testimony regarding his confession fail for two reasons.

First, no false or misleading testimony was admitted at trial. A comparison of Offie Evans' recently discovered statement and his testimony at trial reveals substantially identical testimony regarding McCleskey's confession that he saw the policeman with a gun and knew there was a choice between getting shot by the policeman or shooting the policeman. Compare Pet. Exhibit E, at 6 with Trial Tr. at 870. While Offie Evans did use the word "panic" in his written statement when describing this dilemma, the addition of this word adds nothing to the substance of the trial testimony, which conveyed to the jury the exigencies of the moment when petitioner fired upon Officer Schlatt. Second, even if the omission of this one phrase did render the testimony of Offie Evans misleading, this claim would fail because there is no reasonable likelihood that the jury's judgment regarding petitioner's guilt and his sentencing would have been altered by the addition of the phrase "panic" to otherwise substantially identical testimony.

C. Caldwell Claim.—

Petitioner's third new claim is based upon references by the prosecutor at petitioner's trial to appellate review of the jury sentencing decision and to the reduction on appeal of prior life

sentences imposed on petitioner. These references are said to have violated petitioner's eighth amendment rights and right to due process of law as guaranteed by the fourteenth amendment.

To the extent petitioner claims that the reference to the reduction of prior life sentences was constitutionally impermissible in that it led the jury to impose the death penalty for improper or irrelevant reasons, see Tucker v. Francis, 723 F.2d 1504 (11th Cir. 1984), this claim comes too late in the day. Petitioner was aware of these comments at the time he filed his first federal habeas petition but did not articulate this claim at that time. Because the state has pled abuse of the writ, petitioner must establish that the failure to raise this claim during the first federal habeas proceeding was not due to intentional abandonment or inexcusable neglect. Petitioner has offered no excuse for not raising this claim before. He was represented by competent counsel at the time and should not be heard to argue that he was unaware that these facts would support the claim for habeas relief. Indeed, this court recognized the potential for such a claim when passing upon the first federal habeas petition and concluded "it has not been raised by fully competent counsel." McCleskey v. Kemp, 580 F. Supp. at 388 n. 27.

Successive petition and abuse of the writ problems also plague this claim to the extent that petitioner is arguing that the prosecutor's reference to the appellate process somehow diminished the jury's sense of responsibility during the sentencing phase. This claim in due process terms was presented to this court by the first federal habeas petition and rejected. McCleskey v. Zant, 580 F. Supp. at 387-88 (citing inter alia Corn v. Zant, 708 F.2d 549, 557 (11th Cir. 1983)). Petitioner has offered no reason that the ends of justice would be served by re-visiting this due process claim.

Petitioner also argues that reference to the appellate process violated his eighth amendment rights. Although petitioner did not articulate this eighth amendment claim at the time of the first federal habeas proceeding, the failure to raise the claim at that time does not amount to an abuse of the writ. Only after this court ruled upon the first federal habeas petition did the Supreme Court indicate that it is a violation of the eighth amendment "to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." Caldwell v. Mississippi, 472 U.S. 320, 328-29 (1985). This circuit has recently held that failure to raise a Caldwell claim in a first federal habeas petition filed before the decision does not amount to abuse of the writ because there has been a change in the substantive law. Adams v. Dugger, 816 F.2d 1493, 1495-96 (11th Cir. 1987) (per curiam).

Although this court must reach the merits of the Caldwell claim, the claim itself fails for the same reasons that the due process prong of this claim failed. The essential question is whether the comments likely caused the jury to attach diminished

consequences to their deliberations on the death penalty. See McCleskey v. Zant, 580 F. Supp. at 388. A review of the prosecutor's actual comments at petitioner's trial does not reveal any impermissible suggestions regarding the appellate process which would have led the jury to believe that the responsibility for imposing the death penalty rested elsewhere. As this court observed when passing upon the due process claim raised by the first petition,

> The prosecutor's arguments in this case did not intimate to the jury that a death sentence could be reviewed or set aside on appeal. Rather, the prosecutor's argument referred to petitioner's prior criminal record and the sentences he had received. The court cannot find that such arguments had the effect of diminishing the jury's sense of responsibility for its deliberations on petitioner's sentence. Insofar as petitioner claims that the prosecutor's arguments were impermissible because they had such an effect, the claim is without merit.

McCleskey v. Zant, 580 F. Supp. at 388.

D. Batson Claim.

Petitioner's final claim rests upon the alleged systematic exclusion of black jurors by the prosecutor at petitioner's trial. This exclusion is said to have violated petitioner's right to a representative jury as guaranteed by the sixth and fourteenth amendments.

This claim was not raised during the first federal habeas proceedings. However, failure to raise this claim could not be said to constitute abuse of the writ because prior to the Supreme

Court's decision in Batson v. Kentucky, ___ U.S. ___, 107 S.Ct. 708 (1987), petitioner could not have made out a prima facie claim absent proof of a pattern of using preemptory strikes to exclude black jurors in trials other than petitioner's. See id. at 710-11 (citing Swain v. Alabama, 380 U.S. 202 (1965)).

Although petitioner did not abuse the writ by failing to raise this claim earlier, the claim itself lacks merit. The holding in Batson, which allows defendants to make the prima facie showing of an unrepresentative jury by proving a systematic exclusion of blacks from their own jury, has not been given retroactive application. The Batson decision does not apply retroactively to collateral attacks "where the judgment of conviction was rendered, the availability of appeal exhausted, and the time for petition for certiorari had elapsed" before the Batson decision. Allen v. Hardy, ___ U.S. ___, 106 S.Ct. 2878, 2880 n. 1 (1986) (per curiam). Although the Allen decision did not involve a habeas petitioner subject to the death penalty, this circuit has specifically held that Batson may not be applied retroactively even to a habeas petitioner subject to the death penalty. See Lindsey v. Smith, 820 F.2d 1137, 1145 (11th Cir. 1987); High v. Kemp, 819 F.2d 988, 992 (11th Cir. 1987).

VI. OTHER MOTIONS.

Also pending before this court are petitioner's motions for discovery and for leave to exceed this court's page limits. The court presumes that the above resolution of the petitioner's various claims and the evidentiary hearing held in this case

obviate the need for any further discovery. Petitioner's motion for discovery, filed before the evidentiary hearing, does not provide any reason to think otherwise. The motion for discovery is therefore DENIED. The motion to exceed page limits is GRANTED.

VII. CONCLUSION.

In summary, the petition for a writ of habeas corpus is DENIED as to petitioner's Giglio, intentional discrimination, and Ake claims because those claims are successive and do not fall within the ends of justice exception. The petition for a writ of habeas corpus is DENIED as to petitioner's Mooney, Caldwell and Batson claims because they are without merit. Petitioner's motion for discovery is DENIED and his motion to exceed page limits is GRANTED. The petition for a writ of habeas corpus is GRANTED as to petitioner's Massiah claim unless the state shall re-try him within 120 days of the receipt of this order.

SO ORDERED, this 23rd day of December, 1987.

J. OWEN FORRESTER
UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET
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FOOTNOTES

1 Petitioner was also convicted on two counts of armed robbery and sentenced to two consecutive life sentences.

2 Another distinct ground for finding excusable neglect is a showing that the petitioner did not realize that the facts of which he had knowledge could constitute a basis for which federal habeas corpus relief could be granted. Booker v. Wainwright, 764 F.2d 1371, 1376 (11th Cir. 1985). Although "[t]he exact scope of this alternative exception to the abuse of writ doctrine lacks adequate definition," id., it would appear from the cases that it applies only when the petitioner appeared pro se in presenting the first habeas petition. See, e.g., Haley v. Estelle, 632 F.2d 1273, 1276 (5th Cir. 1980).

3 "... [W]e hold that the Baldus study does not demonstrate a constitutionally significant risk of racial bias affecting the Georgia capital-sentencing process." (Powell, J., for the majority). McCleskey v. Kemp, ___ U.S. ___, 107 S.Ct. 1759 at 1778 (1987).

4 See the discussion of McCleskey's Massiah claim infra.

5 References to the transcripts of the July 8, July 9, and August 10, 1987 hearings will be to "I TR.," "II Tr.," and "III Tr.," respectively.

6 Dissenting Justice White, joined by Clark and Harland, JJ., protested the new "constitutional rule ... barring the use of evidence which is relevant, reliable and highly probative of the issue which the trial court has before it." 377 U.S. at 208. The dissenters were "unable to see how this case presents an unconstitutional interference with Massiah's right to counsel. Massiah was not prevented from consulting with counsel as often as he wished. No meetings with counsel were disturbed or spied upon. Preparation for trial was in no way obstructed. It is only a sterile syllogism -- an unsound one, besides -- to say that because Massiah had a right to counsel's aid before and during the trial, his out-of-court conversations and admissions must be excluded if obtained without counsel's consent or presence." Id. at 209.

The dissenters highlighted the incongruity of overturning Massiah's conviction on these facts. "Had there been no prior arrangements between [the confederate] and the police, had [the confederate] simply gone to the police after the conversation had occurred, his testimony relating Massiah's statements would be readily admissible at the trial, as would a recording which he might have made of the conversation. In such event, it would simply be said that Massiah risked talking to a friend who decided to disclose what he knew of Massiah's criminal activities. But if, as occurred here, [the confederate] had been cooperating with the police prior to his meeting with Massiah, both his evidence and the recorded conversation are somehow transformed into inadmissible evidence despite the fact that the hazard to Massiah remains precisely the same -- the defection of a confederate in crime." Id. at 211.

7 Justice Rehnquist, dissenting, questioned the validity of Massiah: "The exclusion of respondent's statements has no relationship whatsoever to the reliability of the evidence, and it rests on a prophylactic application of the Sixth Amendment right to counsel that in my view entirely ignores the doctrinal foundation of that right." 447 U.S. at 289. Echoing many of the concerns expressed by Justice White in Massiah, id. at 290, Justice Rehnquist argued that "there is no constitutional or historical support for concluding that an accused has a right to have his attorney serve as a sort of guru who must be present whenever an accused has an inclination to reveal incriminating information to anyone who acts to elicit such information at the behest of the prosecution." Id. at 295-96. Admitting that the informants in Henry and in Massiah were encouraged to elicit information from the respective defendants, Justice Rehnquist "doubt[ed] that most people would find this type of elicitation reprehensible." Id. at 297.

For criticism of Henry for extending Massiah "despite that decision's doctrinal emptiness" and for giving Massiah "a firmer place in the law than it deserves," see Salzburg, Forward: The Flow and Ebb of Constitutional Criminal Procedure in the Warren and Burger Courts, 69 Geo.L.J. 151, 206-08 (1980).

8 There is some question whether Ben Wright's testimony on the fact of the murder would have been admissible at all absent corroboration by Evans' testimony. See O.C.G.A. §24-4-8 (uncorroborated testimony of an accomplice not sufficient to establish a fact). But see McCleskey v. Kemp, 753 F.2d at 885 (Wright's testimony corroborated by McCleskey's admitted participation in the robbery; corroboration need not extend to every material detail).

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9 Here, as in Massiah and Henry, the evidence is excluded and the conviction consequently reversed despite the fact that the evidence is "relevant, reliable and highly probative" of petitioner's guilt. Massiah, 377 U.S. at 208 (White, J., dissenting). There is no question that petitioner's incriminating statements to Evans were made voluntarily and without coercion. Had Evans been merely a good listener who first obtained McCleskey's confession and then approached the authorities, Evans' testimony would have been admissible. The substance of the evidence would have been no different, McCleskey's risk in speaking would have been no different, and McCleskey's counsel would have been no less absent, but the evidence would have been admissible simply because the state did not intentionally seek to obtain it. While this court has grave doubts about the historical and rational validity of the Supreme Court's present interpretation of the sixth amendment, those doubts have been articulated ably in the dissents of Justice White and Justice Rehnquist. See supra, notes 4 and 5. Until the Supreme Court repudiates its present doctrine this court will be obliged to reach the result it reaches today.

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APPENDIX B

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JAN 10 1989

Luther D. Thomas, Clerk
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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

WARREN MC CLESKEY,	:	
Petitioner,	:	
vs.	:	CIVIL ACTION NO. 1:87-CV-1517-JOF
RALPH M. KEMP, Superintendent, Georgia Diagnostic and Classification Center,	:	
Respondent.	:	

ORDER

This matter is before the court on respondent's motion to reopen judgment. Fed. R. Civ. P. 60(b).

I. FACTS.

This petition for writ of habeas corpus was filed July 7, 1987. With the petition was a motion for stay of execution. This court granted the stay of execution verbally July 9, 1987, and in a formal order July 10, 1987. A two-day hearing was held on the petition for writ of habeas corpus July 8 and 9, 1987. The court continued the evidentiary hearing until August 10, 1987. On December 23, 1987 the court granted in part and denied in part the petition for writ of habeas corpus, and judgment was entered the same day. Respondent appealed, and petitioner cross-appealed. The judgment was stayed by the court March 9, 1988. The pending motion for relief from final judgment based on newly discovered evidence was filed May 6, 1988. The court entered an order allowing discovery until August 1, 1988 on the two issues of due

diligence and of the previously unavailable witness, Offie Evans' knowledge.

Respondent seeks to reopen the December 1987 judgment based on the present availability of Offie Evans. Evans was a witness at petitioner's trial. The evidentiary hearings on the petition for writ of habeas corpus revealed that Evans had been moved purposely to a cell adjacent to McCleskey's in order to elicit information from him. The court found that this was a violation of the Massiah doctrine. See Order, December 23, 1987. Evans did not testify at the evidentiary hearings on the habeas corpus petition.

Petitioner attempted to locate Mr. Evans during the July hearings in order for him to testify. An attorney working with petitioner's counsel made repeated phone calls to Offie Evans' sister looking for Mr. Evans. He was not able to reach Mr. Evans, but did get the address of another sister who he was supposedly staying with at the time. The attorney made repeated visits to the sister's house in order to try and find Mr. Evans. The attorney was told that Mr. Evans came by the residence every now and then but was not staying there. Stevenson Affidavit. Petitioner also hired an investigator, T. Delaney Bell, to help locate Mr. Evans. The investigator visited several addresses of both Mr. Evans and relatives, over a four-day period in June 1987. The investigator contacted family members again on July 6, 1987 and was told that they did not know where he was staying. Bell Aff. During the July 8th hearing the court noted

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that the federal marshal had tried to serve Mr. Evans at a sister's house but the sister did not know where he was. Respondent made no efforts to contact or locate Mr. Evans.

The respondent sent two letters to petitioner in the period between the July and August hearings to notify petitioner's counsel of the witnesses he would call in the August hearing. Both of those letters referred to the respondent's intent to re-call witnesses who had previously testified in the July hearings, but neither mentioned any desire or intention to call Mr. Evans as a witness. In April 1988, counsel for respondent learned that Mr. Evans was in the Fulton County Jail on other charges. Respondent now seeks to set aside the judgment in order to take the testimony of Offie Evans.

II. CONCLUSIONS OF LAW.

Petitioner has moved this court to expand the record to include: discovery conducted pursuant to the court's order of June 17, 1988; Affidavits of Stevenson, Bell and Hashimi; Docket Sheet, United States v. Offie Gene Evans, No. 28027; Sentence, Fulton Superior State Court v. Offie Evans, No. A-16523 (May 15, 1973); and a newspaper clipping, Atlanta Constitution, December 24, 1987. Petitioner's two motions are unopposed, and for good cause shown petitioner's motion to expand the record, and second motion to expand the record are GRANTED.

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Rule 60(b)[1] defines the circumstances under which a party may obtain relief from a final judgment. It should be construed in order to do substantial justice, but this does not mean that final judgment should be lightly reopened. The desirability for order and predictability in the judicial process speaks for caution in the reopening of judgments. Griffin v. Swim-Tech Corp., 722 F.2d 677 (11th Cir. 1984). The provisions of this rule must be carefully interpreted to preserve the delicate balance between the sanctity of final judgments and the "incessant command of the court's conscience that justice be done in light of all the facts." Id., citing Bankers Mortgage Company v. United States, 423 F.2d 73, 77 (5th Cir.), cert. denied, 399 U.S. 927 (1970) (emphasis in original). Rule 60(b) motions are directed to the sound discretion of the district court. Because a motion for new trial under Rule 60(b) is an extraordinary motion, the requirements of the rule must be strictly met. Seutieri v. Paige, 808 F.2d 785 (11th Cir. 1987).

A. Rule 60(b)(2).

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[1] Respondent's motion is based on Rule 60(b)(2) and (6). The rule says,

> On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons; ... (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); ... (6) any other reason justifying relief from the operation of the judgment.

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In order to succeed under 60(b)(2), a party must satisfy a five-part test: 1) the evidence must be newly discovered since the trial; 2) due diligence on the part of the movant to discover the new evidence must be shown; 3) the evidence must not be merely cumulative or impeaching; 4) the evidence must be material; and 5) the evidence must be such that a new trial would probably produce a new result. Seutieri, 808 F.2d at 793; see also, Taylor v. Texgas Corp., 831 F.2d 255 (11th Cir. 1987).

1. Newly Discovered.

Offie Evans' identity has been known to the state since the initial trial. The respondent contends this is newly discovered evidence because Evans has not been able to testify about the question which became crucial in this petition for habeas corpus; that is, the relationship between himself and the police, and whether he was directed by the authorities to elicit incriminating statements from McCleskey. Evans has given evidence at least three times in this case, in the original trial, the state habeas proceeding, and in his statement given in August 1978. Moreover, petitioner points out that in October 1981, Mr. Evans gave a deposition in the case of McCleskey's co-defendant, Bernard Depree. That deposition was filed in a federal habeas petition on behalf of Depree, in which the state was represented by respondent's present counsel. Petitioner contends that this deposition includes testimony about his contacts with the Atlanta Police while in the Fulton County Jail

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in 1978, and denials that he made police contacts until after he had spoken with Mr. McCleskey. Petitioner points out that the testimony in that deposition is contradictory to the testimony given in the deposition taken pursuant to this motion, but that the essentials are the same.

In light of the above discussion, it is apparent that Evans' testimony is not truly newly discovered but rather is merely newly produced. See, Johnson Waste Materials v. Marshal, 611 F.2d 593 (5th Cir. 1980) (checks and records which had been misplaced at time of trial were not newly discovered evidence sufficient to support 60(b)(2) motion). The fact that the essential substance of this testimony was in a previous deposition filed in the public records and known to respondent's counsel also indicates it is not newly discovered. Seutieri, 808 F.2d at 794 (evidence contained in public records at time of trial cannot be considered newly discovered evidence); Taylor, 831 F.2d at 255 (evidence cannot be newly discovered if in possession of moving pa-ty or his attorney prior to entry of judgment). Where the movant was aware of a witness's identity and knowledge of the transaction, and chose not to track him down because of the expense, the evidence is not newly discovered because he was aware of the existence of the evidence before the trial. Parrilla-Lopez v. United States, 841 F.2d 16 (1st Cir. 1988). Similarly, in this case, the government was aware of the witness's existence, identity and relationship to the transaction but did not attempt to have him testify at

trial. It is evident that Offie Evans' testimony is not truly newly discovered under the relevant authority.

2. Due Diligence.

In the June 17, 1988 order, the court noted that Respondent's "due diligence is measured by what the respondent knew at the time. That would include what the respondent knew about petitioner's efforts to locate Offie Evans. That is not necessarily the sum total of his knowledge nor do the petitioner's efforts to locate Evans relieve him of any obligation to utilize resources available to him."

Respondent contends that though he did not make any efforts to track down Offie Evans during the summer of 1987, it was apparent from the activities of the petitioner that such actions would be futile.[2] Petitioner points out that the Atlanta Bureau of Police Services has enjoyed a special relationship with Mr. Evans over the years, and that if the department had been looking for him, Mr. Evans might have made himself available or with those larger resources could have been found. Petitioner especially points to the testimony of Assistant District Attorney Russ Parker that he had no information or leads as to Evans' location, but that he "could probably find him. [I have] spent enough time with him." I Tr. 174.

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[2] It appears that respondent's knowledge of petitioner's efforts to locate Evans came only from petitioner's counsel's statements at the evidentiary hearings.

Discovery pursuant to this motion reveals that respondent made no efforts to locate Evans during the summer of 1987. See, Respondent's Answer to First Interrogatories of Petitioner, No. 1. Respondent now contends that the deposition of Evans shows that he was outside of Atlanta, and respondent would not have been able to locate him anyway. However, the affidavits of petitioner's assistants show that Evans' relatives had seen him at various times during petitioner's search for him. Therefore, it is unclear where exactly Mr. Evans was at the time and whether or not he could have been found. Moreover, it is not good enough merely to say that it would be impossible to find the evidence. Due diligence is measured by respondent's knowledge and actions. The standard under 60(b)(2) is that the movant exercise due diligence in order to find the relevant evidence before entry of judgment. Respondent relied on petitioner's actions in seeking Mr. Evans, but made no efforts of his own. As the court previously noted, petitioner's efforts did not relieve respondent of any obligation to utilize his own resources to locate Evans. Movant has not demonstrated the due diligence prong of the 60(b)(2) standard.

3. Evidence is Not Cumulative or Impeaching; Materiality.

Evans' deposition testimony essentially asserts that he was not moved intentionally to be placed next to McCleskey, and in fact was not moved at all, and was not an informant. His testimony goes directly to the issue involved, and therefore is

material. However, there are numerous internal contradictions within the deposition, and contradictions with Evans' previous statements, or the statements of other witnesses. Also, it is clear that Mr. Evans has his own motives for denying his status as an informant. He expressed concern several times during his deposition about newspaper accounts which had labeled him an informant, because that kind of information could get a man killed. Evans Depo., p. 25.

4. Likelihood of Producing a Different Result.

It is unlikely Evans' testimony would produce a different result. The credibility or believability problems with his testimony are evident. He has a strong motivation for saying he was not an informant, not only because of recriminations from his associates, but also in order to stay in favor with the police and prosecutors who have used him to testify in the past. The numerous contradictions within his deposition also lead the court to the conclusion that his testimony would not be believable. See Petitioner's Brief in Response to Respondent's Supplement to Rule 60(b) Motion. In finding a Massiah violation, the court relied on the testimony of Officer Ulysses Worthy that someone requested his permission to move Evans to be near McCleskey, Order, December 23, 1987, p. 18, even in the face of other law enforcement personnel who denied requesting that Evans be moved or having any knowledge of such a request. Order, p. 19. The court relied on Worthy's testimony and noted that "[t]he lack of corroboration by other

witnesses is not surprising; the other witnesses, like Assistant District Attorney Parker, had no reason to know of a request to move Evans or, like Detective Dorsey, had an obvious interest in concealing any such arrangement. Worthy, by contrast, had no apparent interest or bias that would explain any conscious deception." Order, p. 22. Therefore, Evans' testimony is not likely to change the credibility of Worthy's testimony or the fact that petitioner showed by a preponderance of the evidence that a Massiah violation occurred.

Therefore, for the above reasons, respondent's motion under 60(b)(2) is DENIED.

B. Rule 60(b)(6).

Rule 60(b)(6) grants federal courts broad authority to relieve a party from a final judgment "upon such terms as are just" provided the motion is made within a reasonable time and is not premised on one of the grounds in (b)(1) through (b)(5). Liljeberg v. Health Services Acquisition Corp., ___ U.S. ___, 56 U.S.L.W. 4637, 4642 (1988). This ground should be applied only in exceptional circumstances. Id. The party seeking relief under 60(b)(6) has the burden of showing that absent such relief, an extreme and unexpected hardship will result. Griffin, 722 F.2d at 680. Respondent contends that in the unusual circumstances of this case, it would serve the ends of justice to reopen judgment under 60(b)(6). However, respondent has shown no exceptional circumstances outside those discussed in the Rule 60(b)(2) motion. There is little likelihood that if

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this motion is denied an extreme hardship will result to respondent. Therefore, respondent's motion under Rule 60(b)(6) is DENIED.

III. CONCLUSION.

In sum, petitioner's two motions to expand record are GRANTED. Respondent's motion for relief from final judgment is DENIED.

SO ORDERED this 6th day of January, 1989.

J. Owen Forrester

J. OWEN FORRESTER
UNITED STATES DISTRICT JUDGE

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APPENDIX C

jury's recommendation of life imprisonment when balanced against the several aggravating factors. The supreme court determined that the jury was made aware of the victim's reputation for violence, *Lusk II*, 498 So.2d at 905, and that the jury's recommendation "was not based on any valid mitigating factor discernible from the record." *Lusk I*, 446 So.2d at 1043. That court further determined from a review of the record that the trial judge "did not ignore evidence presented by Lusk in mitigation," but found it "clear that the trial judge did not believe that said evidence in its totality rose to the level of mitigation in Lusk's case." *Id.* The state supreme court thus held that the dictates of *Tedder* had been satisfied.

The state trial court acknowledged that it considered the mitigating evidence offered by Lusk in his trial, as did the Supreme Court of Florida. This court may examine the application of Florida's jury override scheme, *Parker v. Dugger*, 876 F.2d 1470, 1474 (11th Cir.1989), but we may not second-guess the state courts regarding whether the trial court "complied with the mandates of *Tedder*." *Id.* at 1475. It is not our function to decide whether we agree with the advisory jury or with the trial judge and the Supreme Court of Florida. Our review, rather, is limited to ascertaining whether the *result* of the override scheme is arbitrary or discriminatory. *Spaziano v. Florida*, 468 U.S. 447, 465, 104 S.Ct. 3154, 3165, 82 L.Ed.2d 340 (1984). Lusk contends that we should grant only limited deference to state override proceedings. On the contrary, to the extent that those proceedings do not produce an arbitrary or discriminatory result, the Constitution is not violated, and we will not second-guess the state courts on a matter of state law. The state courts concluded that there were no *reasonable* bases for the jury's recommendation despite the fact that both the jury as advisor and the judge as sentencer were made aware of mitigating factors. On the facts of this case, we do not find that the result of the application of *Tedder* was arbitrary or irrational.

IV. *Conclusion*

Because it granted relief as to the sentence on the basis of the jury override, the district court did not address other claims asserted by Lusk which challenge his sentence.[9] While we could address those claims, *see Lindsey v. Smith*, 820 F.2d 1137 (11th Cir.1987), we conclude that a proper exercise of our discretion in this case, given the nature of the claims and the issues presented, is to remand them to the district court so that the district court may address them in the first instance. The judgment of the district court is REVERSED to the extent that it grants relief on the jury override issue and AFFIRMED on all other issues. The case is REMANDED to the district court for consideration of the claims that court has not yet addressed.

Warren McCLESKEY, Petitioner-Appellee,

v.

Walter ZANT, Superintendent, Georgia Diagnostic and Classification Center, Respondent-Appellant.

Nos. 88-8085, 89-8085.

United States Court of Appeals, Eleventh Circuit.

Nov. 22, 1989.

As Amended Dec. 13, 1989.

After defendant's convictions and sentences for murder and two counts of armed

9. These claims are: (1) that Lusk's death sentence violated the Eighth Amendment because it was based on the unconstitutionally vague statutory aggravating circumstance that the murder was "especially heinous, atrocious or cruel;" (2) that the Florida death penalty statute improperly shifted the burden of proof to the defendant to show that mitigating circumstances outweighed aggravating circumstances; (3) that Lusk was denied due process because counsel failed to review the presentence report with him prior to sentencing and because the trial court failed to ascertain whether Lusk had reviewed the report; and (4) that Lusk's Eighth Amendment rights were violated because the state trial judge believed that he was barred from considering notions of mercy in his sentencing decision.

robbery were affirmed by the Georgia Supreme Court, 245 Ga. 108, 263 S.E.2d 146, defendant petitioned for habeas corpus relief. The United States District Court for the Northern District of Georgia, Nos. 87-CV-1517, 1:87-CV-1517-JOF, J. Owen Forrester, J., granted relief, 580 F.Supp. 338, and appeal was taken. The Court of Appeals, 753 F.2d 877, reversed. After the United States Supreme Court, 481 U.S. 279, 107 S.Ct. 1756, 95 L.Ed.2d 262, affirmed, defendant filed second habeas petition. The District Court granted relief, and State appealed. The Court of Appeals, Kravitch, Circuit Judge, held that: (1) petitioner abused writ by deliberately abandoning his Sixth Amendment *Massiah* claim, and (2) any error based on alleged *Massiah* violation was harmless.

Reversed.

1. Habeas Corpus ⇐898(1)

Under doctrine of "abuse of writ," federal court may decline to entertain second or subsequent habeas corpus petition that raises claim that petitioner did not raise in prior petition. 28 U.S.C.A. § 2244(b); Rules Governing § 2254 Cases, Rule 9(b), 28 U.S.C.A. foll. § 2254.

See publication Words and Phrases for other judicial constructions and definitions.

2. Habeas Corpus ⇐897, 898(1)

"Successive petition" is one that raises claim already adjudicated through prior habeas petition, while petition that raises grounds for relief not raised in prior petition is analyzed as "abuse of the writ." 28 U.S.C.A. § 2244(b); Rules Governing § 2254 Cases, Rule 9(b), 28 U.S.C.A. foll. § 2254.

See publication Words and Phrases for other judicial constructions and definitions.

3. Habeas Corpus ⇐899

State has burden of pleading that habeas petitioner has abused the writ. Rules Governing § 2254 Cases, Rule 9(b), 28 U.S.C.A. foll. § 2254.

4. Habeas Corpus ⇐898(2)

Once state has alleged abuse of the writ, habeas petitioner must be afforded opportunity to justify his or her previous failure to raise claim. Rules Governing § 2254 Cases, Rule 9(b), 28 U.S.C.A. foll. § 2254.

5. Habeas Corpus ⇐899

If court determines that habeas petitioner has failed to carry burden of disproving abuse of the writ, it may dismiss petition unless ends of justice demand that court reach merits. Rules Governing § 2254 Cases, Rule 9(b), 28 U.S.C.A. foll. § 2254.

6. Habeas Corpus ⇐899

Whether second or subsequent habeas petition is to be dismissed on abuse of the writ grounds is left to sound discretion of district court; discretion in such matters is not unfettered, however, and its sound exercise will rarely permit district court to hear petition that clearly constitutes abuse of the writ. Rules Governing § 2254 Cases, Rule 9(b), 28 U.S.C.A. foll. § 2254.

7. Habeas Corpus ⇐898(3)

Habeas petitioner abused writ by deliberately abandoning his Sixth Amendment *Massiah* claim when he raised claim in initial state habeas petition, then failed to raise claim in his first federal habeas petition, although defendant was unaware of evidence supporting claim until he filed second federal habeas petition; counsel had some factual basis for raising claim in state habeas petition, and failed to raise claim in first federal petition after initial investigatory efforts proved unsuccessful. 28 U.S.C.A. § 2244(b); Rules Governing § 2254 Cases, Rule 9(b), 28 U.S.C.A. foll. § 2254; U.S.C.A. Const.Amend. 6.

8. Habeas Corpus ⇐898(3)

Abandoning claim after initial investigatory efforts prove unsuccessful cannot insulate habeas petitioner from abuse of the writ. 28 U.S.C.A. § 2244(b); Rules Governing § 2254 Cases, Rule 9(b), 28 U.S.C.A. foll. § 2254.

9. Habeas Corpus ⇐898(3)

Habeas petitioner and his or her counsel may not circumvent abuse of the writ doctrine by failing to follow through with investigation and then later claiming that claim could not have succeeded earlier on facts as then known. 28 U.S.C.A. § 2244(b); Rules Governing § 2254 Cases, Rule 9(b), 28 U.S.C.A. foll. § 2254.

10. Criminal Law ⇐394.1(2)

Remedy for *Massiah* violation is not automatic reversal of conviction, but rather exclusion of evidence tainted by violation of defendant's right to counsel. U.S.C.A. Const.Amend. 6.

11. Habeas Corpus ⇐490(3)

Any error based on alleged *Massiah* violation, occurring when inmate testified in murder prosecution that defendant made "jailhouse confession" in which he admitted that he shot police officer during robbery, was harmless, in view of other evidence indicating defendant's guilt, including statements of codefendant, and defendant's confession to his participation in robbery. U.S.C.A. Const.Amend. 6.

Mary Beth Westmoreland, Asst. Atty. Gen., Susan V. Boleyn, William B. Hill, Atlanta, Ga., for respondent-appellant.

Robert H. Stroup, Atlanta, Ga., Julius L. Chambers, NAACP Legal Defense Fund, James M. Nabrit, II, John Charles Boger, New York City, for petitioner-appellee.

Appeals from the United States District Court for the Northern District of Georgia.

Before KRAVITCH and EDMONDSON, Circuit Judges, and RONEY, Senior Circuit Judge.

KRAVITCH, Circuit Judge:

This is a consolidated appeal by the State of Georgia from the district court's grant of Warren McCleskey's second petition for a writ of habeas corpus and from the district court's denial of the State's motion under Fed.R.Civ.P. 60(b) for relief from the judgment. The district court granted the writ solely on the basis of McCleskey's claim that his sixth amendment rights had been violated under *Massiah v. United States*, 377 U.S. 201, 84 S.Ct. 1199, 12 L.Ed.2d 246 (1964). Because we find that the district court abused its discretion in failing to dismiss McCleskey's *Massiah* allegation as an abuse of the writ, we reverse the district court without reaching the merits of McCleskey's *Massiah* claim or of the State's Rule 60(b) motion.

I. FACTS[1]

McCleskey was arrested and charged with the murder of a police officer during an armed robbery of the Dixie Furniture Store. The store was robbed by four men. Three entered through the back door and one through the front. Each of the four men was armed. McCleskey had a .38 caliber Rossi white-handled, nickel-plated pistol, Ben Wright had a sawed-off shotgun, and the other two had blue steel pistols. The man who entered through the front secured the store, forcing the employees to lie on the floor. The others rounded up the employees in the rear and began to tie them up with tape. The manager was forced at gunpoint to turn over the store receipts, his watch, and six dollars. Responding to a silent alarm, a police officer entered the store by the front door. He proceeded approximately fifteen feet down the center aisle. Two shots were fired. One shot struck the police officer in the head causing his death. The other shot glanced off a pocket lighter in the officer's pocket and lodged in a sofa. That bullet was recovered. The robbers fled. Sometime later, McCleskey was arrested in connection with another armed robbery.

McCleskey was identified by two of the store personnel as the robber who came in the front door. Shortly after his arrest, McCleskey confessed to participating in the robbery, but maintained that he was not the triggerman. One of his accomplices, Ben Wright, testified that McCleskey ad-

1. The statement of facts is taken from the Georgia Supreme Court's opinion on direct appeal, *McCleskey v. The State*, 245 Ga. 108, 263 S.E.2d 146 (1980).

mitted to shooting the officer. Offie Evans, a jail inmate housed near McCleskey testified that McCleskey made a "jail house confession" in which he claimed he was the triggerman. The police officer was killed by a bullet fired from a .38 caliber Rossi handgun. Though the weapon was not recovered, McCleskey had stolen a .38 caliber Rossi in a holdup of a Red Dot grocery store two months earlier.

II. PRIOR PROCEEDINGS

The jury convicted McCleskey of murder and two counts of armed robbery. It sentenced McCleskey to death for the murder of the police officer and to consecutive life sentences for the two robbery counts. In 1980, these convictions and sentences were affirmed by the Georgia Supreme Court, *McCleskey v. State*, 245 Ga. 108, 263 S.E.2d 146, *cert. denied*, 449 U.S. 891, 101 S.Ct. 253, 66 L.Ed.2d 119 (1980). In January of 1981, McCleskey petitioned for habeas corpus relief in the Superior Court of Butts County, asserting over twenty challenges to his conviction and sentence. In an amendment to his petition, McCleskey alleged a *Massiah* violation, claiming that the introduction into evidence of statements he made to an informer violated his rights under the sixth amendment. *See Massiah v. United States*, 377 U.S. 201, 84 S.Ct. 1199. The petition was denied after an evidentiary hearing and the Georgia Supreme Court denied McCleskey's application for a certificate of probable cause to appeal. The United States Supreme Court denied McCleskey's petition for certiorari. *McCleskey v. Zant*, 454 U.S. 1093, 102 S.Ct. 659, 70 L.Ed.2d 631 (1981).

McCleskey filed his first federal habeas petition in district court in December of 1981, asserting eighteen grounds for granting the writ. That petition did *not* include a claim under *Massiah*. It did, however, include a claim under *Giglio v. United States*, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972), alleging that the state prosecutor had failed to reveal that Offie Evans, one of its witnesses, had been promised favorable treatment as a reward for his testimony. In 1984, the district court granted habeas corpus relief as to McCleskey's *Giglio* claim. It ordered that his conviction and sentence for malice murder be set aside, but affirmed his convictions and sentences for armed robbery. *McCleskey v. Zant*, 580 F.Supp. 338 (N.D.Ga. 1984).

Both parties appealed and in 1985, the Eleventh Circuit, sitting *en banc*, reversed the district court's grant of the writ on the *Giglio* claim and affirmed on all claims denied by the district court. *McCleskey v. Kemp*, 753 F.2d 877 (11th Cir.1985) (en banc). McCleskey then filed a petition for a writ of certiorari in the Supreme Court of the United States. The Supreme Court granted certiorari limited to consideration of the application of the Georgia death penalty and affirmed the Eleventh Circuit. *McCleskey v. Kemp*, 481 U.S. 279, 107 S.Ct. 1756, 95 L.Ed.2d 262, *petition for rehearing denied*, 482 U.S. 920, 107 S.Ct. 3199, 96 L.Ed.2d 686 (1987).

McCleskey filed a subsequent petition for a writ of habeas corpus in state court in June of 1987. In an amendment to that petition, McCleskey once again raised a *Massiah* claim, alleging that newly discovered evidence demonstrated that a jail inmate of McCleskey's was acting on behalf of the State as an informant. The state court granted the State's motion to dismiss and the Georgia Supreme Court denied McCleskey's application for a certificate of probable cause.

McCleskey filed the present petition for a writ of habeas corpus in federal district court in July of 1987. After evidentiary hearings on the petition in July and August of 1987, the district court entered an order granting habeas corpus relief only as to McCleskey's murder conviction and sentence based upon the finding of a *Massiah* violation. *McCleskey v. Kemp*, No. C87-1517A (N.D.Ga. Dec. 23, 1987).

The State now appeals the district court's grant of the writ, claiming that the district court abused its discretion in failing to dismiss McCleskey's *Massiah* allegation as an abuse of the writ and that the district court erred in finding a violation of *Massiah*.[2]

III. ABUSE OF THE WRIT

A. *Background*

[1] Under the doctrine of "abuse of the writ," a federal court may decline to entertain a second or subsequent habeas corpus petition that raises a claim that the petitioner did not raise in a prior petition. The doctrine is grounded in the court's equitable power to decline to entertain a habeas corpus petition properly within its jurisdiction when "a suitor's conduct in relation to the matter at hand ... disentitle[s] him to the relief he seeks." *Sanders v. United States*, 373 U.S. 1, 17, 83 S.Ct. 1068, 1078, 10 L.Ed.2d 148 (1963) (quoting *Fay v. Noia*, 372 U.S. 391, 438, 83 S.Ct. 822, 849, 9 L.Ed.2d 837 (1963)).

[2] The statutory basis for the doctrine of abuse of the writ in cases of successive petitions for habeas corpus can be found at 28 U.S.C. § 2244(b)[3] and Rule 9(b) of the Rules Governing Section 2254 Cases in the United States District Courts.[4] These provisions address the problem of prisoners filing the same claims in successive petitions as well as the problem of prisoners who abuse the writ by filing their claims piecemeal. A "successive petition" is one that raises a claim already adjudicated through a prior petition, while a petition that raises grounds for relief not raised in the prior petition is analyzed as an "abuse of the writ." *See Gunn v. Newsome*, 881 F.2d 949, 955 n. 6 (11th Cir.1989) (en banc) (plurality opinion), *petition for cert. filed*, No. 89-611, 1989 WL 129621 (Oct. 16, 1989).

A federal court's decision to exercise its equitable power to dismiss a petition is based on different considerations in the two types of cases. In cases of successive petitions, equity usually will not permit a petitioner to reassert a claim resolved against him "in the hope of getting before a different judge in multijudge courts." *See* Sec. 2254 Cases R. 9 advisory committee's note. In cases of abuse of the writ, equity counsels against allowing "needless piecemeal litigation" or "collateral proceedings whose only purpose is to vex, harass, or delay." *Sanders*, 373 U.S. at 18, 83 S.Ct. at 1078. In both instances, the need for finality in criminal law counsels strongly against courts repeatedly reviewing criminal convictions. *See Kuhlmann v. Wilson*, 477 U.S. 436, 452-53, 106 S.Ct. 2616, 2626-27, 91 L.Ed.2d 364 (1986) (plurality opinion).

[3] The state has the burden of pleading that the habeas petitioner has abused the writ. *Price v. Johnston*, 334 U.S. 266, 291-92, 68 S.Ct. 1049, 1063, 92 L.Ed. 1356 (1948). This circuit has held that "[t]he state carries its burden by recounting the petitioner's writ history, identifying the claims not raised before the instant petition

2. This court stayed the briefing schedule of the appeal pending the State's filing in district court of a motion under Fed.R.Civ.P. 60(b) for relief from the judgment based on the availability of witness Offie Evans. The district court denied the motion and this court granted the State's motion to consolidate the State's original appeal and its appeal from the denial of the motion for relief from the judgment.

3. 28 U.S.C. § 2244(b) states as follows:
When after an evidentiary hearing on the merits of a material factual issue, or after a hearing on the merits of an issue of law, a person in custody pursuant to the judgment of a State court has been denied by a court of the United States or a justice or judge of the United States release from custody or other remedy on an application for a writ of habeas corpus, a subsequent application for a writ of habeas corpus in behalf of such person need not be entertained by a court of the United States or a justice or judge of the United States unless the application alleges and is predicated on a factual or other ground not adjudicated on the hearing of the earlier application for the writ, and unless the court, justice, or judge is satisfied that the applicant has not on the earlier application deliberately withheld the newly asserted ground or otherwise abused the writ.

4. Rule 9(b) provides as follows:
Successive Petitions. A second or successive petition may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ.

and alleging that the petitioner abused the writ in violation of 28 U.S.C. § 2254, Rule 9(b)." *Booker v. Wainwright*, 764 F.2d 1371, 1376 (11th Cir.1985), *cert. denied*, 474 U.S. 975, 106 S.Ct. 339, 88 L.Ed.2d 324 (1985). The State has clearly met its burden here, as it is evident that McCleskey did not assert his *Massiah* claim in his first federal habeas petition.

[4, 5] McCleskey's previous failure to assert the claim does not, however, require the federal court to dismiss his petition, for the courts have recognized that "not all piecemeal litigation is needless." *Booker v. Wainwright, id.; see also Haley v. Estelle*, 632 F.2d 1273, 1276 (5th Cir.1980).[5] Once the state has alleged abuse of the writ, the petitioner must be afforded the opportunity to justify his previous failure to raise the claim. In deciding whether a petitioner has presented sufficient justification, courts have required the petitioner to show that he did not deliberately abandon the claim and that his failure to raise it was not due to inexcusable neglect. *See Woodard v. Hutchins*, 464 U.S. 377, 379, 104 S.Ct. 752, 753, 78 L.Ed.2d 541 (1984) (per curiam) (Powell, J., concurring, joined by four other justices); *Demps v. Dugger*, 874 F.2d 1385, 1391 (11th Cir.1989), *petition for cert. filed*, No. 89-5277, 1989 WL 113448 (Aug. 4, 1989); *Witt v. Wainwright*, 755 F.2d 1396, 1397 (11th Cir.), *cert. denied*, 470 U.S. 1039, 105 S.Ct. 1415, 84 L.Ed.2d 801 (1985); *Potts v. Zant*, 638 F.2d 727, 740–41 (5th Cir. Unit B 1981), *cert. denied*, 454 U.S. 877, 102 S.Ct. 357, 70 L.Ed.2d 187 (1981).[6] If a court determines that the petitioner has failed to carry his burden of disproving an abuse of the writ, it may dismiss the petition unless the ends of justice demand that the court reach the merits. *Sanders*, 373 U.S. at 16–19, 83 S.Ct. at 1078–79; *Demps v. Dugger*, 874 F.2d at 1391; *Davis v. Kemp*, 829 F.2d 1522, 1526 (11th Cir.1987), *cert. denied*, — U.S. —, 108 S.Ct. 1099, 99 L.Ed.2d 262 (1988).

[6] Whether a second or subsequent petition is to be dismissed on abuse of the writ grounds is left to the sound discretion of the district court. *Sanders*, 373 U.S. at 18, 83 S.Ct. at 1079; *Darden v. Dugger*, 825 F.2d 287, 294 (11th Cir.1987), *cert. denied*, — U.S. —, 108 S.Ct. 1125, 99 L.Ed.2d 285 (1988); *Potts v. Zant*, 638 F.2d at 741. Yet discretion in such matters is not unfettered, and its sound exercise will rarely permit a district court to hear a petition that clearly constitutes an abuse of the writ. *See Gunn v. Newsome*, 881 F.2d at 949.

In the instant appeal, the district court found that McCleskey could not be said to have intentionally abandoned his claim. We disagree and find that the district court abused its discretion in failing to dismiss a clearly abusive petition.

B. *Deliberate Abandonment of the Massiah Claim*

[7] McCleskey asserts that his failure to raise a *Massiah* claim in his earlier federal petition is justified because at the time he filed that petition, he lacked the evidence to support such a claim. To demonstrate a violation of sixth amendment rights under *Massiah v. United States*, 377 U.S. 201, 84 S.Ct. 1199, a defendant must show that the prosecution deliberately elicited incriminating statements from him in the absence of his lawyer. *Massiah* itself involved statements made by a defendant free on bail to a co-indictee in a car that had been wired by the government. In *United States v. Henry*, 447 U.S. 264, 100 S.Ct. 2183, 65 L.Ed.2d 115 (1980), the Supreme Court applied *Massiah* to a situation in which incriminatory statements were made to a cellmate who was a government informant. In *Kuhlmann v. Wilson*, the Supreme Court stressed that a defendant alleging a *Massiah* violation "must demonstrate that the police and their informant

5. In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir.1981) (en banc), this court adopted as binding precedent all decisions of the former Fifth Circuit handed down before October 1, 1981.

6. In *Stein v. Reynolds Securities, Inc.*, 667 F.2d 33 (11th Cir.1982), this court adopted as binding precedent all decisions of Unit B of the former Fifth Circuit handed down after September 30, 1981.

took some action, beyond merely listening, that was designed deliberately to elicit incriminating remarks." 477 U.S. at 459, 106 S.Ct. at 2630.[7]

McCleskey bases his *Massiah* claim on two pieces of evidence. The first is a 21-page written statement of Offie Evans, a prisoner who was incarcerated in the cell next to McCleskey's when McCleskey was in the Fulton County Jail awaiting trial. Evans testified against McCleskey at trial, relating several incriminating statements made by McCleskey. The written statement, which had been given to the Atlanta Police Department in August of 1978, sets out these conversations in great detail, demonstrating that Evans lied to McCleskey in order to get information from him.[8] McCleskey argues that the written statement shows evidence of an *ab initio* relationship between Evans and the prosecution and is thus highly relevant to his *Massiah* claim.

The second piece of evidence McCleskey uses to support his *Massiah* claim is the testimony of Ulysses Worthy who was captain of the day watch at the Fulton County Jail during the summer of 1978. Worthy testified at two separate points during the district court hearings on McCleskey's second habeas petition. Though Worthy's testimony was at times confused and contradictory, the district court credited Worthy's assertion that at some point some officer involved with the case had asked that Evans be moved to a different cell. The district court judge relied heavily on Worthy's testimony in holding that McCleskey had presented a valid *Massiah* claim. In fact, he found that "[t]he lack of corroboration by other witnesses is not surprising; the other witnesses, like Assistant District Attorney Parker, had no reason to know of a request to move Evans or, like Detective Dorsey, had an obvious interest in concealing any such arrangement. Worthy, by contrast, had no apparent interest or bias that would explain any conscious deception." *McCleskey*, No. C87-1517A, slip op. at 22.

McCleskey maintains that he was unaware of both pieces of evidence critical to his *Massiah* claim until well after he filed his first federal habeas petition. It is uncontested that he did not obtain Evans' statement until July of 1987 and that he did not know about the existence of Worthy until the time of the hearing on the second federal habeas petition. The State strongly contends that habeas counsel realized or should have realized that Evans had made a written statement concerning his conversations with McCleskey and asserts that petitioner's counsel should have made some effort to obtain that statement. The district court found, however, that McCleskey was not in fact aware of the written statement, and we cannot say that this determination is clearly erroneous.

Assuming that McCleskey was unaware of both pieces of evidence, the question before us is whether McCleskey's unawareness of the *factual* bases for his *Massiah* claim at the time of his first federal habeas petition is sufficient to justify his failure to present the claim. The district court found that it was sufficient, holding that McCleskey's unawareness precluded a finding of deliberate abandonment of the claim, despite the fact that McCleskey had raised it in his first state habeas petition. We disagree.

In finding that McCleskey did not deliberately abandon his *Massiah* claim, the district court stated that:

> First petitioner cannot be said to have intentionally abandoned this claim. Although petitioner did raise a *Massiah* claim in his first state petition, that claim was dropped because it was obvious that

7. In *Lightbourne v. Dugger*, 829 F.2d 1012 (11th Cir.1987), *cert. denied*, — U.S. —, 109 S.Ct. 329, 102 L.Ed.2d 346 (1988), this circuit characterized petitioner's burden in a *Massiah/Henry* claim as one involving two elements: "In order to establish a violation of the Sixth Amendment in a jailhouse informant case, the accused must show (1) that a fellow inmate was a government agent; and (2) that the inmate deliberately elicited incriminating statements from the accused." *Id.* at 1020.

8. For instance, Evans told McCleskey that his name was Charles, that he was the uncle of codefendant Ben Wright, and that he was supposed to be a participant in the robbery himself.

it could not succeed given the then-known facts. At the time of his first federal petition, petitioner was unaware of Evans' written statement, which, as noted above, contains strong indications of an *ab initio* relationship between Evans and the authorities. Abandoning a claim whose supporting facts only later become evident is not an abandonment that "for strategic, tactical, or any other reasons ... can be described as the deliberate by-passing of state procedures." ... Petitioner's *Massiah* claim is therefore not an abuse of the writ on which no evidence should have been taken. This is not a case where petitioner has reserved his proof or deliberately withheld his claim for a second petition.... Nor is the petitioner now raising an issue identical to one he earlier considered without merit.

McCleskey, No. C87-1517A, slip op. at 24 (citations omitted).

This holding by the district court misconstrues the meaning of deliberate abandonment. McCleskey included a *Massiah* claim in his first state petition, dropped it in his first federal petition, and now asserts it again in his second federal petition.[9] Given that McCleskey had asserted the *Massiah* claim in his first state habeas petition, it is clear that the issue was not unknown to him at the time of his first federal petition. Further, we must assume that at the time McCleskey filed his first state habeas petition, counsel had determined that there was some factual basis for a *Massiah* claim. Indeed, such a determination is not surprising. Not only was counsel aware that Evans was in a cell next to McCleskey,[10] but counsel was also aware that some sort of relationship existed between Evans and the police, as this formed the basis of McCleskey's *Giglio* claim.[11] The petitioner and his counsel did not accidentally fail to include the *Massiah* claim in the federal petition, but made a knowing choice not to pursue the claim after having raised it previously. This constitutes prima facie evidence of deliberate abandonment. In *Darden v. Dugger*, we stated that:

> The record shows that the issue presented in this third petition was specifically withdrawn from the district court's consideration as being not well founded. The issue was abandoned. Intentional abandonment of a claim is precisely the context that application of the concept of abuse of the writ is intended to address. *Witt*, 755 F.2d at 1397. Petitioner may be deemed to have waived his right to a hearing on a successive application for federal habeas relief when he deliberately abandons one of his grounds at the first hearing.

825 F.2d at 294.

When asked at the second federal habeas hearing why he did not pursue the *Massiah* claim in his first federal petition, counsel responded that his efforts to find evidence in support of the claim had failed. It appears, however, that these efforts were somewhat lacking. Counsel testified that he informally attempted to contact jailers at the Fulton County Jail, but that they could provide him with no information.[12]

9. In an amendment to his first state petition, McCleskey alleged that:

> The introduction into evidence of petitioner's statements to an informer, elicited in a situation created to induce the petitioner to make incriminating statements without assistance of counsel, violated the petitioner's right to counsel under the Sixth Amendment to the Constitution of the United States and Section 2-111 of the 1976 Constitution of the State of Georgia.

10. Evans testified at trial as to certain statements that McCleskey had made in prison.

11. In *Giglio v. United States*, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972), the Supreme Court held that the state violates due process when it obtains a conviction on the basis of a witness's testimony when the witness has failed to disclose a promise of favorable treatment from the prosecution. McCleskey included a *Giglio* claim in his first state and first federal habeas petitions.

12. At his second federal habeas hearing, the lawyer who represented McCleskey at the first federal habeas hearing testified that he "spoke with a couple of Atlanta Bureau of Police Services Officers" in order to find out how to develop factual evidence in support of a claim. Pursuant to their suggestion, counsel spoke with two or three persons who were deputies at the Fulton County Jail. He testified that "none of them had any information. Basically they had no recollection of the circumstances regarding how Evans came to be assigned to the jail cell that he was assigned to or of any conversations with the Atlanta Bureau of Police Services Detectives regarding Offie Evans' assignment to that jail cell."

Counsel apparently made no attempt to contact persons who clearly had contact with Evans and McCleskey at the Fulton County Jail. He testified that he did not speak to Detective Dorsey (mentioned by Evans in his testimony at the first state habeas hearing), to Detectives Jowers or Harris (officers who had investigated the McCleskey case), or Deputy Hamilton (who testified at trial regarding his contact with Mr. Evans).

He also noted that at a deposition taken for the first state habeas hearing, Russell Parker, the District Attorney prosecuting the case, claimed that he was unaware of any instance in which Evans had worked for the Atlanta Police Department prior to his overhearing conversations at the Fulton County Jail. Counsel testified that he did not carry the *Massiah* claim over into the federal habeas petition because he "looked at what we had been able to develop in support of the claim factually in the state habeas proceeding and made the judgment that we didn't have the facts to support the claim and, therefore, did not bring it into federal court."

[8] Abandoning a claim after initial investigatory efforts prove unsuccessful cannot insulate a petitioner from abuse of the writ. *See Witt v. Wainwright*, 755 F.2d at 1397 (insufficient to allege that evidence was not available if it was within petitioner's power to elicit such evidence at time of earlier petition); *Woodard v. Hutchins*, 464 U.S. 377, 379 & n. 3, 104 S.Ct. 752, 753 & n. 3, 78 L.Ed.2d 541 (1984) (per curiam) (Powell, J., concurring, joined by four other justices) (petitioner found to have abused the writ when he is unable to explain why examination providing evidence of insanity was not conducted earlier); *Antone v. Dugger*, 465 U.S. 200, 205 & n. 3, 206, 104 S.Ct. 962, 964 & n. 3, 965, 79 L.Ed.2d 147 (1984) (per curiam) (haste with which first habeas petition prepared does not require courts to consider claims withheld from that petition if substance could have been presented in first petition).

[9] McCleskey places great emphasis on the fact that the State allegedly withheld Evans' 21-page statement from both trial and habeas counsel. The statement was ultimately obtained in June of 1987 through a request pursuant to the Georgia Open Records Act, O.C.G.A. § 50-18-72(a). It is clear, however, that the statement itself does not demonstrate the existence of a *Massiah* violation. At most, it was simply the catalyst that caused counsel to pursue the *Massiah* claim more vigorously. The key piece of evidence supporting McCleskey's *Massiah* claim was the testimony of Worthy, who testified for the first time at the second federal habeas hearing in July of 1987. Counsel claims that he did not discover Worthy until he engaged in a "massive, indiscriminate effort to subpoena everyone whose name was mentioned in any document." McCleskey has not presented any reason why counsel would have been unable to contact Ulysses Worthy back in 1981 when the first federal habeas petition was filed. Nor has he shown that a more extensive effort at that time to track down persons with information as to what transpired in the county jail during the summer of 1978 would not have turned up Worthy. A petitioner and his counsel may not circumvent the abuse of the writ doctrine by failing to follow through with an investigation and then later asserting that the claim could not have succeeded earlier on the facts as then known. It will only be possible to avoid piecemeal litigation if counsel is required to make a thorough investigation of the facts at the time of petitioner's first petition for habeas corpus.[13]

C. *Ends of Justice*

Having found that McCleskey abused the writ by deliberately abandoning his *Massiah* claim, we must now decide whether the "ends of justice" require consideration of

13. We also note that in 1981 there apparently still existed records listing each prisoner's cell assignment and any visitation of prisoners by outsiders. These records, which would have corroborated or disproved Worthy's testimony, have since been destroyed.

his claim on the merits.[14] *See Sanders v. United States*, 373 U.S. at 16–19, 83 S.Ct. at 1078–79. In *Kuhlmann v. Wilson*, the Supreme Court attempted to give greater content to the open-ended "ends of justice" inquiry. Its statement, however, that "the 'ends of justice' require federal courts to entertain such petitions only where petitioner supplements his constitutional claim with a colorable showing of factual innocence," 477 U.S. at 454, 106 S.Ct. at 2627, commanded only a plurality of the justices. *See Messer v. Kemp*, 831 F.2d 946, 958 n. 19 (11th Cir.1987) (en banc), *cert. denied*, — U.S. —, 108 S.Ct. 1586, 99 L.Ed.2d 902 (1988). Thus, the circumstances under which ends of justice would require rehearing of an otherwise abusive petition remain unparticularized.

We find it unnecessary to more narrowly define the circumstances in this case. For, the instances in which ends of justice would require a rehearing of a claim do not include those in which a violation of a constitutional right would be found to constitute harmless error.[15] The members of this panel disagree as to whether the district court was correct in finding that McCleskey had established a *Massiah* violation. Pretermitting that inquiry, however, the panel is unanimous that any violation that may have occurred would constitute harmless error and that the district court erred in concluding otherwise.

D. *Harmless Error*

[10, 11] The remedy for a *Massiah* violation is not an automatic reversal of a conviction, but rather the exclusion of evidence tainted by the violation of petitioner's right to counsel. *United States v. Morrison*, 449 U.S. 361, 365, 101 S.Ct. 665, 668, 66 L.Ed.2d 564 (1981). The previous use of the tainted evidence will not result in a reversal of a conviction if it constituted "harmless error." Under the harmless error doctrine, the state must "prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 828, 17 L.Ed.2d 705 (1967). *See also, Satterwhite v. Texas*, 486 U.S. 249, 108 S.Ct. 1792, 1798, 100 L.Ed.2d 284 (1988) (harmless error analysis applied to sixth amendment violation tainting evidence in sentencing phase of capital trial); *Brown v. Dugger*, 831 F.2d 1547, 1554 (11th Cir.1987).

In this case, the district court held that the error complained of could not be found harmless because Evans' testimony concerning McCleskey's incriminating statements was critical to the State's case. In reaching this conclusion, the court ignored the Eleventh Circuit's previous discussion in *McCleskey*, 753 F.2d at 884–85, of the importance of the evidence introduced through Evans' testimony at trial. Though that discussion occurred in the context of McCleskey's *Giglio* claim, it clearly has bearing on the import of Evans' testimony in the context of McCleskey's *Massiah* claim. It is true, as petitioner argues, that the harmless error inquiry in the case of a *Giglio* claim differs from the inquiry in the case of a *Massiah* violation, but this difference does not save McCleskey's claim.

The crucial question in a *Giglio* claim is whether the state's failure to disclose its promise of reward to a witness affected the judgment of the jury as to the credibility of that witness. *See Giglio*, 405 U.S. at 154, 92 S.Ct. at 766. In its previous opinion, the Eleventh Circuit held that the judgment of the jury that convicted McCleskey was not affected by the lack of disclosure. Its holding was based on two separate grounds. First, it found that "Evans' credibility was exposed to substantial impeachment even without the detective's statement and the inconsistent description of his escape," as the jury had already been made aware of Evans' extensive list of past convictions. 753 F.2d at 884. Second, and more important for our purposes, the Eleventh Circuit found that, in light of all the other evidence presented to the jury, Evans' testimony could not " 'in any reasonable likelihood have affected the judgment of the jury.' " *Id.* at 885 (quoting *Napue v. Illinois*, 360 U.S. 264, 271, 79 S.Ct. 1173, 1178, 3 L.Ed.2d 1217 (1959)). This is precisely the finding that must be made in a harmless error analysis under *Massiah* and upon reexamination, we find no reason to disturb this finding.

Evans was called by the State on rebuttal to strengthen its proof that McCleskey was the triggerman at the holdup. He testified that McCleskey had admitted to him that he had shot the policeman and that McCleskey had admitted to wearing makeup to disguise himself during the robbery. He also stated that McCleskey said he would have shot his way out even if there had been a dozen policemen.

Turning first to Evans' testimony regarding McCleskey's admission that he was the triggerman, we feel that the State has met its burden of proving, beyond a reasonable doubt, that this testimony did not contribute to the verdict. First, as noted by the en banc court, McCleskey's codefendant, Ben Wright, also testified that McCleskey was the triggerman. Though Georgia law requires corroboration of an accomplice's testimony in felony cases, it is clear that corroboration can be through circumstantial as well as direct evidence. *Davis v. State*, 178 Ga.App. 760, 344 S.E.2d 730, 732 (Ga.App.1986) (quoting *Gunter v. State*, 243 Ga. 651, 655, 256 S.E.2d 341 (Ga.1979)).

The State presented a substantial amount of circumstantial evidence. McCleskey himself confessed to his participation in the robbery. The officer was killed by the man who entered and secured the front of the store while the other three men were in the back. McCleskey was identified by two of the store personnel as the robber who came in the front door. The officer was killed by a bullet from a .38 caliber Rossi handgun. The State presented evidence that McCleskey had stolen a .38 caliber Rossi in a previous holdup. The gun that McCleskey had stolen had a white handle. The State presented testimony from an eyewitness that the robber who ran out the front door after the robbery was carrying a pearl-handled pistol. This evidence not only corroborates Ben Wright's testimony, but is of sufficient quantity to allow this court to find that any additional testimony by Evans did not contribute to the verdict.

Evans' testimony regarding McCleskey's statement that he was wearing makeup could also not have reasonably affected the jury's determination. The en banc court found that:

> Evans' testimony that McCleskey had made up his face corroborated the identification testimony of one of the eyewitnesses. Nevertheless, this evidence was not crucial to the State's case. That McCleskey was wearing makeup helps establish he was the robber who entered the furniture store through the front door. This fact had already been directly testified to by McCleskey's accomplice and two eyewitnesses as well as corroborated by McCleskey's own confession. That Evans' testimony buttresses one of the eyewitnesses' identifications is relatively unimportant.

753 F.2d at 885.

Finally, petitioner asserts that Evans' testimony as to McCleskey's statement that he would have been willing to shoot twelve policemen affected the jury's finding as to the presence of malice and increased its willingness to impose a sentence of death. Once again, we find that the en banc court's analysis of this issue demonstrates that this testimony was not crucial to the jury's finding of malice murder. The court wrote that:

> In his closing argument, however, the prosecutor presented to the jury three reasons supporting a conviction for malice murder. First, he argued that the physical evidence showed malicious intent because it indicated that McCleskey shot the police officer once in the head and a second time in the chest as he lay dying on the floor. Second, the prosecutor asserted that McCleskey had a choice, either to surrender or to kill the officer. That he chose to kill indicated malice.

14. The district court did not reach the "ends of justice" inquiry as it found that McCleskey's claim did not constitute abuse of the writ.

15. *See Messer v. Kemp*, 831 F.2d at 958–59: Because we conclude, as a matter of law, that the record in this case fails to disclose an *Ake* violation, our "ends of justice" analysis need not proceed any further. That is, we need not address any other factors relevant to the "ends of justice" in light of our conclusion that no constitutional violation occurred.

Third, the prosecutor contended that McCleskey's statement to Evans that he still would have shot his way out if there had been twelve police officers showed malice. This statement by McCleskey was not developed at length during Evans' testimony and was mentioned only in passing by the prosecutor in closing argument.

Id. at 885. In addition, the court finds no reasonable likelihood that the jury's imposition of the death penalty was affected by Evans' testimony. The prosecutor did not introduce Evans as a witness at the sentencing phase of trial, nor did he use Evans' testimony to portray McCleskey as a hardened criminal deserving of death, but concentrated instead on McCleskey's prior convictions.[16]

Because evidence other than Evans' testimony presented in the case presents such a clear indication of McCleskey's guilt, this court finds beyond a reasonable doubt that the jury would have convicted and sentenced McCleskey as it did even without Evans' testimony. Our determination that any *Massiah* error would be harmless precludes a finding that the ends of justice would require us to entertain McCleskey's claim on the merits.

CONCLUSION

The judgment of the district court granting the petition for writ of habeas corpus is reversed and the petition is hereby denied as an abuse of the writ.

REVERSED.

16. This case can easily be distinguished from *Satterwhite v. Texas*, 486 U.S. 249, 108 S.Ct. 1792, 100 L.Ed.2d 284 (1988), a case that petitioner cites as controlling. In *Satterwhite*, a psychiatrist, who had interviewed the defendant in violation of his sixth amendment rights, testified in a separate sentencing proceeding that the defendant presented a threat to society through continuing acts of violence. In finding that the constitutional error was not harmless, the Court stressed that under Texas law, a jury may not sentence a defendant to death unless it finds that the defendant would commit acts of violence and would be a threat to society. Additionally, the Court found that the psychiatrist's testimony stood out "both because of his qualifications as a medical doctor specializing in psychiatry and because of the powerful content of his message." *Id.* at ——, 108 S.Ct. at 1799. In the instant case, the jury was not instructed as to future dangerousness, and the Eleventh Circuit found, in its previous discussion of the *Giglio* violation, that Evans' testimony had already been greatly impeached by his own criminal background. 753 F.2d at 884.

James C. PEARSON, Deceased, Mildred Pearson, Personal Representative, and Mildred Pearson, Petitioners-Appellants,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent-Appellee.

No. 88-3961
Non-Argument Calendar.

United States Court of Appeals,
Eleventh Circuit.

Dec. 11, 1989.

Personal representative of taxpayer's estate petitioned Tax Court for redetermination of IRS' deficiency decision. The Tax Court entered judgment in favor of IRS, and personal representative appealed. The Court of Appeals held that IRS does not need to mail notice of income tax deficiency to both spouses executing joint tax return, when IRS seeks to collect entire deficiency from single spouse.

Affirmed.

1. Internal Revenue ⇐4544

IRS does not need to mail notice of tax deficiency to both spouses executing joint income tax return, where IRS seeks to collect entire deficiency from single spouse. 26 U.S.C.A. § 6212(b)(2).

2. Internal Revenue ⇐4647

Tax Court did not have power to grant taxpayer's estate equitable relief from no-

APPENDIX D

United States Court of Appeals
Eleventh Circuit
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

February 6, 1990

Miguel J. Cortez
Clerk

In Replying Give Number
Of Case And Names Of Parties

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW:

Nos. 88-8085 & 89-8085 - MCCLESKEY V. ZANT

The enclosed order has been entered on petition(s) for rehearing.

See Rule 41, Federal Rules of Appellate Procedure, and Eleventh Circuit Rule 41-1 for information regarding issuance and stay of mandate.

Sincerely,

MIGUEL J. CORTEZ, Clerk

By: Matt Davidson
Deputy Clerk

Encl.

Mary Beth Westmoreland, Esq.
Robert Stroup, Esq.
John Charles Boger, Esq.

REHG-1
7/87

IN TH UNITED STATES COURT OF AP ALS

FOR THE ELEVENTH CIRCUIT

NOS. 88-8085 & 89-8085

U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
FEB 6 1990
MIGUEL J. CORTEZ
CLERK

WARREN MCCLESKEY,

Petitioner-Appellee,

versus

WALTER ZANT, Superintendent, Georgia Diagnostic and Classification Center,

Respondent-Appellant.

Appeals from the United States District Court for the Northern District of Georgia

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING IN BANC

(Opinion November 22, 1989, 11 Cir., 198__, ____F.2d____).

(FEB 6 1990)

Before KRAVITCH and EDMONDSON, Circuit Judges, and RONEY, Senior Circuit Judge.

PER CURIAM:

⊠ The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing in banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing In Banc are DENIED.

( ) The Petition(s) for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing In Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause in banc, and a majority of the judges in active service not having voted in favor of it, Rehearing In Banc is DENIED.

ENTERED FOR THE COURT:

Phyllis Kravitch

United States Circuit Judge

APPENDIX E

United States Court of Appeals
Eleventh Circuit
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

Miguel J. Cortez
Clerk

In Replying Give Number
Of Case And Names of Parties

February 14, 1990

MEMORANDUM TO COUNSEL OR PARTIES:

RE: 88-8085 McCleskey v. Kemp
DC DKT NO.: 87-01517 CV

MANDATE STAYED TO AND INCLUDING March 23, 1990

The court has this day granted a stay of the mandate to the date shown above. If during the period of the stay there is filed in this court a Notice from the Clerk of the Supreme Court that the party who has obtained the stay has filed a petition for writ of certiorari in the Supreme Court, the stay shall continue until final disposition by the Supreme Court. Upon the filing of a copy of an order of the Supreme Court denying the petition for writ of certiorari, the mandate shall issue forthwith. See Fed.R.App.P. 41.

The Clerk of the Supreme Court has requested the clerks of the federal courts of appeal to retain the record on appeal until the Supreme Court requests that it be transmitted. Parties will be advised when this occurs. Accordingly, please refrain from routinely requesting transmittal of the record. See Supreme Court Rule 19.1.

A copy of this court's opinion (or Rule 36-1 decision), the judgment, and any order on rehearing should be attached as an appendix to any petition for writ of certiorari (or jurisdictional statement) filed. See Supreme Court Rules 21(k), 15(j).

Sincerely,

MIGUEL J. CORTEZ, Clerk

Reply To: Matt Davidson (404) 331-2904

Consolidated with No. 89-8085

MDT-2 (7/87)

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
FEB 14 1990
MIGUEL J. CORTEZ
CLERK

NOS. 88-8085 &
89-8085

WARREN MCCLESKEY,

Petitioner-Appellee,

versus

WALTER ZANT, Superintendent, Georgia
Diagnostic and Classification Center,

Respondent-Appellant.

Appeals from the United States District Court for the
Northern District of Georgia

ORDER:

( ) The motion of Appellee, Warren McCleskey,
for (X) stay ( ) recall and stay of the issuance of the mandate
pending petition for writ of certiorari is DENIED.

(X) The motion of Appellee, Warren McCleskey,
for (X) stay ( ) recall and stay of the issuance of the mandate
pending petition for writ of certiorari is GRANTED to and including
March 23, 1990, the stay to continue in force until the final
disposition of the case by the Supreme Court, provided that within
the period above mentioned there shall be filed with the Clerk of
this Court the certificate of the Clerk of the Supreme Court that the
certiorari petition has been filed. The Clerk shall issue the
mandate upon the filing of a copy of an order of the Supreme Court
denying the writ, or upon expiration of the stay granted herein
unless the above mentioned certificate shall be filed with the Clerk
of this Court within that time.

( ) The motion of _____
for a further stay of the issuance of the mandate is GRANTED to and
including _____, under the same conditions as set
forth in the preceding paragraph.

( ) IT IS ORDERED that the motion of _____
for a further stay of the issuance of the mandate is DENIED.

Phyllis Kravitch
UNITED STATES CIRCUIT JUDGE

ORD-45

(3)

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ORIGINAL

Supreme Court, U.S.
FILED
APR 27 1990
JOSEPH F. SPANIOL, JR.
CLERK

NO. 89-7024

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

WARREN MCCLESKEY, *
* Petitioner,
v. *
*
WALTER D. ZANT, WARDEN, *
*
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

RECEIVED
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SUPREME COURT, U.S.

BRIEF IN OPPOSITION FOR THE RESPONDENT

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Senior Assistant
Attorney General
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Respondent

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50 pp

QUESTIONS PRESENTED

1.

Did the Eleventh Circuit Court of Appeals properly find that Petitioner had abused the writ by deliberately abandoning a claim raised in his first state habeas corpus proceeding, particularly when the district court's opinion in this case which found a constitutional violation has been reversed?

2.

Is the harmless error analysis conducted by the Eleventh Circuit necessary for a resolution of the abuse of the writ issue?

3.

Did the Eleventh Circuit Court of Appeals properly conduct its harmless error analysis as a mixed question of fact and law and give appropriate deference to any factual findings made by he district court and thus appropriately find that any alleged constitutional violation was harmless beyond a reasonable doubt?

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NO. 89-7024

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

WARREN MCCLEKSEY, *
*
Petitioner,
v. *
*
WALTER D. ZANT, WARDEN, *
*
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION FOR THE RESPONDENT

PART ONE

STATEMENT OF THE CASE

On June 13, 1978, the grand jury of Fulton County, Georgia, returned a three count indictment against the Petitioner, Warren McCleskey, and his three co-indictees, David Burney, Bernard Depree and Ben Wright, Jr., charging said individuals with the offense of murder and with two counts of armed robbery. The Petitioner was tried separately beginning on October 9, 1978, and was found guilty on all three counts. The jury imposed the death penalty after a separate sentencing proceeding on the murder charge, finding that: (1) the offense of murder was committed while the Petitioner was engaged in the commission of another capital felony and (2) the offense of murder was committed against a peace officer, corrections employee or fireman while engaged in the performance of his official duties. See O.C.G.A § 17-10-30(b)(2) and (b)(8). Consecutive life sentences were imposed on the two counts of armed robbery.

The Petitioner then appealed his convictions and sentences to the Supreme Court of Georgia. The Supreme Court of Georgia affirmed the convictions and sentences. McCleskey v. State, 245 Ga. 108, 263 S.E.2d 146 (1980). The Petitioner subsequently filed a petition for a writ of certiorari to the Supreme Court of the United States asserting that the trial court improperly admitted evidence of other crimes, that the jury's discretion was not properly channelled and that there was a deliberate withholding of the confession to Offie Evans. Certiorari was denied by the Court. McCleskey v. Georgia, 449 U.S. 891 (1980).

On January 5, 1981, the Petitioner filed a petition for habeas corpus relief in the Superior Court of Butts County, Georgia, as Case No. 4909. In the original petition the Petitioner raised numerous allegations including the alleged failure to disclose an "arrangement" with a police agent or

informer (Offie Evans) and the alleged deliberate withholding of the statement made by the Petitioner to Evans. Petitioner subsequently filed an amendment to that petition in which he challenged the introduction into evidence of his statements to "an informer" and raised a challenge essentially to the sufficiency of the evidence. (Respondent's Exhibit No. 3). A hearing was held by the court on January 30, 1980. By way of order dated April 8, 1981, the superior court denied habeas corpus relief. (Respondent's Exhibit No. 4). The Supreme Court of Georgia denied the subsequent application for a certificate of probable cause to appeal on June 7, 1981. A subsequent petition for a writ of certiorari was denied by the Supreme Court of the United States on November 30, 1981.

On December 30, 1981, the Petitioner filed a petition for habeas corpus relief in the United States District Court for the Northern District of Georgia. Among other allegations the Petitioner asserted the failure to disclose an "understanding" with witness Evans.

Evidentiary hearings were held before the district court in August, 1983, and in October, 1983. An order was entered on February 1, 1984, in which the court rejected all the issues raised in the petition except for the alleged undisclosed deal with witness Evans. The court directed that habeas corpus relief be granted as to that issue and ordered that the conviction and sentence for malice murder be set aside, but affirmed the convictions and sentences for armed robbery. McCleskey v. Zant, 580 F. Supp. 338 (M.D.Ga. 1984).

Both parties appealed the decision of the district court to the United States Court of Appeals for the Eleventh Circuit. On March 28, 1984, the Eleventh Circuit Court of Appeals directed that the case be heard initially by the court sitting en banc. On January 29, 1985, the en banc court issued an opinion which affirmed all convictions and sentences and considered the following issues: (1) Giglio claim relating to the testimony of Offie Evans; (2) ineffective assistance of counsel; (3) burden-shifting jury charge; (4) discrimination in the application of the death penalty; and (5) prosecution-prone jury. McCleskey v. Kemp, 753 F.2d 877 (11th Cir. 1985) (en banc).

The Petitioner then filed a petition for a writ of certiorari in the Supreme Court of the United States. In that petition, the Petitioner asserted that the death penalty was discriminatorly applied, that there was a violation of Giglio v. United States, 405 U.S. 150 (1972), based upon the testimony of Offie Evans, that the charge on intent was impermissibly burden-shifting and that the jury was impermissibly qualified as to capital punishment. (Respondent's Exhibit E). This Court subsequently granted the petition for a writ of certiorari limited to the consideration of the application of the death penalty. On April 22, 1987, the Court issued an opinion concluding that the Petitioner had not shown discrimination in the imposition of the death penalty as to his

case and affirmed the decision of the Eleventh Circuit Court of Appeals. McCleskey v. Kemp, 481 U.S. ___, 107 S.Ct. 1756, reh. den., 107 S.Ct. 3199 (1987). On or about May 16, 1987, Petitioner filed a petition for rehearing by that Court. In that petition, Petitioner reasserted his claim of ineffective assistance of counsel at the sentencing phase, reasserted his claim relating to the charge on intent and reasserted his claim relating to a violation of Giglio v. United States, asserting that the decision in United States v. Bagley, 473 U.S. 667 (1985), justified the granting of the petition. (Respondent's Exhibit F). On June 8, 1987, this Court denied the petition for rehearing.

On June 8, 1987, a successive state habeas corpus petition was filed in the Superior Court of Butts County, Georgia. That petition raised the following allegations: (1) the prosecutor discriminated in the use of peremptory strikes; (2) there was intentional discrimination in this case; (3) the state failed to disclose impeaching evidence (the alleged "deal" with Offie Evans); (4) the trial court erred in denying funds for a ballistics expert; and (5) the prosecutor improperly referred to appellate review in his argument at the sentencing phase. (Respondent's Exhibit G). On June 18, 1987, Respondent filed a motion to dismiss asserting that the petition was successive. (Respondent's Exhibit H).

On June 22, 1987, Petitioner filed an amendment to case number 87-V-1028 in Butts County. In that petition the Petitioner raised two allegations, that is, that Offie Evans was acting as an agent for the State at the time the Petitioner made statements to Evans and that the prosecutor failed to correct alleged misleading testimony by Evans. (Respondent's Exhibit I).

A hearing was held before the Superior Court of Butts County, sitting in Henry County. (Respondent's Exhibit O). On July 1, 1987, the state habeas corpus court entered an order granting Respondent's motion to dismiss finding that the issues were either barred from reconsideration under the principles of res judicata or could reasonably have been raised in the previous petition. (Respondent's Exhibit P).

On July 2, 1987, Petitioner filed an application for a certificate of probable cause to appeal in the Supreme Court of Georgia. (Respondent's Exhibit Q). On July 7, 1987, the Supreme Court of Georgia denied the application.

On July 7, 1987, Petitioner filed a second federal habeas corpus petition in the United States District Court for the Northern District of Georgia. After hearings were held by the district court on July 8, 1987, July 9, 1987, and August 10, 1987, the district court entered an order on December 23, 1987, granting habeas corpus relief only as to Petitioner's murder conviction and sentence based upon the finding of a violation of Massiah v. United States, 377 U.S. 201 (1964). Respondent filed a timely notice of appeal from this ruling.

On April 12, 1988, the Respondent filed a motion for remand in thie Eleventh Circuit Court of Appeals based upon the availability of Offie Gene Evans. By order dated May 2, 1988, and received by counsel on May 5, 1988, Respondent filed a motion to stay the briefing schedule pending the filing of a Rule 60(b) motion in the district court. On May 6, 1988, Respondent filed the Rule 60(b) motion in the district court.

Pursuant to the June 17, 1988, order of the district court, both parties conducted discovery including taking the deposition of Offie Evans on July 13, 1988. After additional pleadings were filed, the Court entered an order on January 10, 1989, denying the motion for relief from judgment.

A panel of the Eleventh Circuit Court of Appeals entered an opinion on November 22, 1989, amended on December 13, 1989, specifically reversing the finding of the district court and concluding that the district court abused its discretion by failing to find an abuse of the writ and that the Petitioner had abused the writ by deliberately abandoning the Sixth Amendment Massiah claim and that any error based on a Massiah violation was harmless. McCleskey v. Zant, 890 F.2d 342 (11th Cir. 1989). Rehearing and rehearing en banc were denied on February 6, 1990. Petitioner has now filed the instant petition challenging the decision of the Eleventh Circuit Court of Appeals.

PART TWO

STATEMENT OF FACTS

The evidence presented at Petitioner's trial showed that on May 13, 1978, he and three co-indictees committed a robbery at the Dixie Furniture Store in Atlanta, Georgia. During the course of the robbery, the Petitioner entered the front of the store while his three co-indictees entered the back. Petitioner was positively identified at trial as one of the participants in the robbery. (T. 231-232, 242, 250).

Following the arrest of the Petitioner, he was taken to Atlanta, Georgia. On May 31, 1978, the Petitioner made a confession to the police in which he admitted his participation in the robbery, but denied that he shot Atlanta Police Officer Frank Schlatt. A Jackson v. Denno hearing was held at trial and the court determined that the confession was freely, intelligently and voluntarily made. (T. 426-505).

Petitioner's co-indictee, Ben Wright, testified at trial and related the details of the robbery and murder. Ben Wright testified that while he carried a sawed-off shotgun, the Petitioner carried a .38 caliber nickle-plated, white-handled pistol. (T. 654-656,

648-649). Wright testified that co-indictee Burney had a blue steel, snub-nosed .32 caliber pistol, while Depree had a blue steel .25 caliber pistol. (T. 649-651).

While Depree, Burney and Wright held several employees in the back of the store, the Petitioner was in front. Employee Classie Burnwell had activated a silent alarm, resulting in the arrival of Officer Frank Schlatt. Shortly after Schlatt entered the front of the store, he was shot. After hearing two shots, Wright observed the Petitioner running out of the front of the store. Wright, Depree and Burney ran out of the back. When they all arrived at the car, Petitioner stated that he had shot the police officer. (T. 658-9).

Mr. Everett New and his wife were stopped in their automobile at a red light near the Dixie Furniture Store. They observed Officer Schlatt arrive at the scene, saw him draw his pistol and enter the store. (T. 330). Mr. New stated that approximately thirty seconds later he heard two shots and shortly thereafter observed a black man running out of the front door carrying a white-handled pistol; however, he could not identify that individual. (T. 331-333).

Petitioner testified in his own behalf at trial and stated that he knew Ben Wright and the other co-indictees, but that he had not participated in the robbery. He relied on an alibi defense, stating that Wright had borrowed his car and that the Petitioner had spent the day at his mother's house and at some apartments in Marietta playing cards. Petitioner named several people who had been present at the apartments, but did not present any of those persons for his defense. (T. 811).

Petitioner denied that he made a statement to Lieutenant Perry that he had participated in the robbery and stated that he made a false statement to Detective Jowers because of the alleged evidence the police had against him (two witnesses who had identified him, the description of his car and a statement from David Burney), because of his prior convictions and because he did not have a good alibi. (T. 823-4).

Petitioner was also identified at trial by two witnesses who had observed him take part in a prior similar robbery. Mr. Paul David Ross, manager of the Red Dot Grocery Store, had identified the Petitioner previously from a set of colored photographs. Ross also testified that during the course of the Red Dot Robbery, his nickle-plated .38 revolver was taken.

Ms. Dorothy Umberger also observed the Petitioner during the April 1, 1978, robbery of the Red Dot Grocery Store. She testified that she was ninety percent certain that the Petitioner was one of the men who had robbed her. She based her identification on viewing him at the scene of that crime. Ms. Umberger had also identified the Petitioner from a photographic display.

In rebuttal to the defense case, the State presented the testimony of Arthur Keissling. This witness testified that he had observed the Petitioner participating in the robbery of Dot's Produce on March 28, 1978. His identification of the Petitioner was positive. (T. 887-889, 896).

The State also presented the testimony of Offie Gene Evans in rebuttal. Mr. Evans had been incarcerated in Fulton County jail in a cell located near the Petitioner and Bernard Depree. Evans related that the Petitioner had talked about the robbery while in custody and had admitted shooting at Officer Schlatt. (T. 869-870).

In Petitioner's statement of facts he addresses the testimony presented before the district court and other aspects of the issues. Respondent would specifically take issue with Petitioner's assertion that the facts allegedly showing a conspiracy are not seriously at issue and would note, as will be set forth subsequently, that Respondent

has always contested any assertion of a "conspiracy" and has always contested any finding of a Massiah violation. Remaining facts which relate to the substantive issue of a Massiah violation will be addressed subsequently.

PART THREE

REASONS FOR NOT GRANTING THE WRIT

I. THE ELEVENTH CIRCUIT COURT OF APPEALS PROPERLY FOUND THAT PETITIONER HAD ABUSED THE WRIT BY DELIBERATELY ABANDONING THE CLAIM OF A MASSIAH VIOLATION PRIOR TO FILING HIS FIRST FEDERAL HABEAS CORPUS PETITION AND PROPERLY FOUND THAT THE DISTRICT COURT ABUSED ITS DISCRETION IN NOT MAKING THIS FINDING.

Petitioner first asserts that the Respondent should not be allowed to assert abuse of the writ after the state allegedly concealed a constitutional violation, thus complaining that the state had unclean hands. Petitioner relies upon factual findings by the district court concerning an alleged secret relationship with an informant. Respondent would note that those factual findings have at all times been disputed by the Respondent and in fact that holding by the district court was

reversed and the Eleventh Circuit Court of Appeals specifically did not address the merits of the claim; therefore, Respondent would assert that any reliance on any factual findings by the district court or legal conclusions by the district concerning a Massiah violation is simply inappropriate.

Petitioner also complains that the Eleventh Circuit Court of Appeals failed to apply a presumption of correctness to alleged factual findings by the district court in relation to the abuse of the writ analysis. Respondent submits that Petitioner is confusing factual findings with legal conclusions. The Eleventh Circuit Court of Appeals specifically acknowledged the factual findings by the district court, but determined that the district court itself was applying an incorrect meaning to the deliberate abandonment standard. The meaning of deliberate abandonment is a legal question, not a factual question. Therefore, a conclusion by the district court that there was no deliberate abandonment necessarily must take into consideration whether that court applied a correct standard. Similarly, although the district court may have found that reasonably competent counsel could not have done certain things, this is not a pure factual finding as what is reasonably competent counsel is a legal question. As will be set forth in more detail subsequently, Respondent submits that the Eleventh Circuit Court of Appeals was correct in its conclusion that the district court abused

its discretion in failing to find an abuse of the writ and that there was a proper finding of a deliberate abandonment of the claim.

Respondent would also note that in arguing the case to this Court Petitioner has blatantly ignored the fact that the Eleventh Circuit Court of Appeals was not examining this case for the first time, but had examined Mr. McCleksey's case en banc several years previously and had specifically examined at that time an allegation relating to the testimony of Offie Evans and was fully aware of the circumstances. In fact, the district court in this case is the one who is ignoring prior holdings of the Eleventh Circuit Court of Appeals rather than the Eleventh Circuit ignoring factual findings by the district court.

The question raised in the instant case in relation to the alleged violation of Massiah v. United States, 377 U.S. 201 (1964), is not one of inexcusable neglect but of deliberate abandonment of an issue. Thus, different considerations come into play than would be considered when faced with an allegation of inexcusable neglect. Inexcusable neglect necessarily involves questions of information known to a petitioner and whether he could have reasonably raised a claim. Deliberate abandonment, which is what is present in the instant case, involves simply a consideration of whether the issue was known and the petitioner or his counsel made a knowing choice not to pursue the claim after having raised it previously.

A review of the testimony presented to the district court at the first hearing shows that there is no question but that the issue was abandoned. First of all, a reference to exhibits submitted to the district court by the Respondent reveals that the issue was raised in the first state habeas corpus petition and was also asserted in the amendment to the first state habeas corpus petition. See Respondent's Exhibit H and attachments thereto. It is also uncontroverted that Petitioner did not raise the claim in the first federal habeas corpus petition. As noted by the district court at the first hearing, it was imminently clear that Evans was located in a jail cell near the Petitioner, which situation would always raise a possibility of a Massiah issue and there was also testimony at the trial that Evans relayed information to a deputy. The district court was concerned as to why there were no previous inquiries as to when Evans might have become an agent of the state, if he did at all. (R4-5). The district court further noted that knowing that Petitioner was located near Evans at the jail and that Evans had apparently cooperated with law enforcement officers should have put counsel on notice to inquire when the cooperation began. Id. at 19. Counsel for the Petitioner never asked either the assistant district attorney or any of the police officers when Mr. Evans began cooperating with them.

Further, Mr. Robert Stroup testified before the district court that he became counsel in this case in April, 1980. He raised more than twenty issues in the state habeas corpus proceeding first filed in Butts County and it occurred to him that there might be a Massiah claim. He felt it was suggested just based on the facts. He made some minimal efforts to seek information, but those efforts fell short of any kind of in depth inquiry. (R4-31-3). He specifically recalled amending the state habeas corpus petition which he viewed as raising a claim of a violation of Massiah. He also knew by the time of the state habeas corpus proceeding that Evans had testified in another case involving the same assistant district attorney. Mr. Stroup's only excuse for why he did not pursue the claim in the first federal habeas proceeding was that he felt that he did not have facts to support the claim. This is despite the fact that Mr. Stroup at no time talked to Detectives Harris or Dorsey prior to or subsequent to the state habeas corpus proceeding and did not recall talking to Deputy Hamilton even though Hamilton testified at the trial. He did not seek to question Detective Dorsey even after Evans mentioned his name at the state habeas corpus hearing and did not subpoena any records regarding the informant claim.

The district court originally specifically found that there was a deliberate withholding of the issue of an ab initio Massiah violation because it was clear that Mr. Stroup thought about the issue at the state habeas corpus stage and decided not to pursue it. (R.4-59).

After all the hearings were conducted, the district court judge changed his mind and decided, "Petitioner cannot be said to have intentionally abandoned the claim." (R3-22-24). The only basis for this decision by the district court was that court's conclusion that counsel was unaware of the written statement of Offie Evans and that, thus, the factual basis for the claim was not known. This clearly reflects an abuse of discretion on the part of the district court as this holding is totally contrary to the original holding of district court in which that court had already found that there was sufficient information in the record to put counsel on notice of a possible Massiah violation even without a copy of a written statement of Offie Evans.

The question presented to the circuit court was whether the district court abused its discretion in simply changing its mind and whether that court should have concluded that based upon counsel's conduct, there had been an abuse of the writ as to this issue. In this case it is clear that counsel knew of the existence of the possibility of raising the claim and simply chose as a matter of tactics not to present the claim in the first federal habeas corpus petition. The simple assertion that counsel did not think he had sufficient facts to prove the claim is insufficient to overcome the barrier of an intentional abandonment of an issue. Insofar as the district court concluded that counsel did not intentionally abandon this

claim, this is certainly a clearly erroneous finding. The record is clear that counsel raised the claim in the state habeas corpus proceeding, failed to raise it in the first federal habeas corpus proceeding and testified as to the basis for his not raising the claim. Counsel obviously felt that he had enough information to raise the claim in the state habeas corpus proceeding in the first place and also raised other claims in the first federal habeas corpus petition which he had been unable to factually substantiate, including his claim of discrimination. If counsel felt that there was any possible merit to the claim, or was even suspicious, he certainly should have continued to pursue the claim in the district court to avoid possible piecemeal litigation. Counsel then could have sought discovery in the district court, as was done on other issues in the first federal habeas corpus proceeding, and the issue would have been litigated years earlier rather than at this late stage of the proceedings. Under these circumstances, Respondent submits that this is clearly the type of needless litigation that is contemplated by Rule 9(b). The cases contemplate courts not considering issues that not only were known to counsel at the time of the filing of the first federal habeas corpus petition, but which counsel admits he evaluated and chose deliberately not to raise, even after having raised them in the state courts.

Further, Respondent submits that counsel certainly had reason to know that there was a written statement of Offie Gene Evans and certainly should have made some effort to obtain that statement prior to this most recent series of collateral attacks.

The trial court conducted an in camera inspection of certain specified material noting in its order, "The court finds that although the documents might become material for rebuttal at trial, they are not now subject to discovery." (T.R. 46). Thus, at this point, counsel knew that there was material which was not disclosed to defense counsel but which was the subject of an in camera inspection. Clearly, trial counsel was free to renew the request at or during trial. Further, during cross-examination of the Petitioner at trial, counsel for the Petitioner objected to cross-examination by the assistant district attorney indicating that he had asked for all statements by the Petitioner. The trial court stated, "He has a statement which was furnished to the Court but it doesn't help your client." (T. 830). Again, this points to the fact that there is some type of written statement which is part of the material included in the in camera inspection which was not disclosed by the trial court. Although this does not clearly indicate that it was in fact a statement of Evans, it certainly indicates that it was a statement made by the Petitioner himself to someone. The only possible conclusion is that it

was a statement made to Offie Evans. The only way for the police to get any written information relating to this was to either obtain a written statement from Evans or make a written report concerning a statement given to them by Evans pertaining to the statement made to Evans by the Petitioner. Certainly, this puts counsel on notice that there is a written document which was not seen by defense counsel prior to trial pertaining to statements made by the Petitioner while in jail.

Further, on direct appeal trial counsel raised an allegation relating to the failure to disclose statements of the Petitioner and the alleged withholding of impeaching evidence. In the brief counsel stated, "Offie Gene Evans' statement contains substantial impeachment value." (See Attachment to Respondent's Exhibit H). In the opinion on direct appeal, the court held, "The prosecutor showed the defense counsel his file, but did not furnish this witness' [Evans'] statement." McCleskey v. State, 245 Ga. 108, 112, 263 S.E.2d 146 (1980). This seems to be a clear indication that the Georgia Supreme Court at least assumed there was a statement by Evans which was part of the in camera inspection. Certainly, if the Supreme Court of Georgia can make that determination from the record then present counsel can also make such a determination.

In addition to the above, a reading of the entire state habeas corpus proceeding shows that counsel most certainly should have been aware of the fact that there was some type of written statement as of the time of that proceeding. Counsel has asserted that he assumed he had the entire prosecutor's file. This is clearly not the case as the record makes it clear that what was given to counsel was the file given to defense counsel. It was clear from the trial transcript and the testimony of defense counsel at the state habeas corpus hearing that there were certain matters not included in the information provided to defense counsel. Present counsel never asked the prosecutor for the documents which were part of the in camera inspection and never sought them in the state habeas corpus proceeding.

A review of trial counsel John Turner's testimony in the state habeas corpus court shows that counsel clearly should have been aware that there was a statement. [1] During the questioning of Mr. Turner, he was asked about the testimony of Offie Evans and whether that was a surprise to him. Mr. Turner responded as follows:

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[1]The state habeas corpus transcript was included as an Exhibit to the first federal habeas corpus case in the district court in No. C81-2434A. The district court stated it would take judicial notice of those records. The Respondent requests that this Court do the same.

Well, yes and no. And the reason I qualify that is because one of the first things I said to Mr. McCleskey when I interviewed him at the Atlanta Jail prior to the preliminary hearing was not to make any statements to anybody about the incident. In fact, I went so far as to say to give him the analogy that a fish can't get caught unless it opens its mouth to bite the hook. I had talked with him constantly about that in terms of have you said anything to anybody. The bottom line was when I got the witness list, I noticed that at some stage some Deputy's names were on there. The only thing I could conclude that something had been said or possibly had been said. And I asked Mr. McCleskey if he had discussed the facts with anyone there at the jail and his Co-Defendant and he said, "No."

(First state habeas corpus transcript at 76, hereinafter referred to as S.H.T.) The court then went on to state, "Well, I think the question should be why they did not give you a copy of the statement he made if you made a motion for it." Id. It is clear from this that the state habeas corpus court felt that there was a statement in writing referring to what Mr. McCleskey had told Offie Evans. Mr. Turner responded, "Well, I can't answer that question even up to this point in time. That was one of the issues I raised on appeal, the fact that I was never given any indication that the statement existed." Id.

The habeas court went on to inquire of Mr. Turner as to whether he and the prosecutor discussed the matter at all. Mr. Turner responded the following:

> We went over the motions, all of the motions and the only thing he said to me about his file was that there were two things which were not included in the file. One was the Grand Jury testimony of a witness and his logic there was that that was not discoverable. And the other was just a statement he had and he didn't disclose what it was or who the person was in that context.

> They clearly understood and they knew that the motion had been filed. So my thinking on the matter was that I had everything, particularly relating to the statements of the Defendant.

(S.H.T.77). The court then inquired in detail as to the right of a defendant to obtain a copy of his own statement under state law. It was also reiterated that Mr. Turner did not contact Deputy Hamilton prior to trial even though his name was on the list due to the fact that "Mr. McCleskey was quite adamant to the fact that he hadn't said anything incriminating or even mentioned the case or discussed it with anyone." Id. at 79-80.

During cross-examination Mr. Turner further testified that he went over the names on the witness list with the Petitioner, "Particularly with criminal records like Offie Evans. That was the one I can recall specifically asking him about." Id. at 86. The Petitioner told Mr. Turner that he did not know who Offie Evans was. Id.

From a review of all of the above at least from the time of the state habeas corpus hearing, it was the general understanding that there was a statement by the Petitioner which was not disclosed to trial counsel prior to trial. The only logical conclusion is that this is in

reality a statement of Offie Evans relating a statement by the Petitioner or at least a report setting forth the information related by Offie Evans concerning what the Petitioner told him. This is further emphasized during the deposition of the assistant district attorney, Russell Parker.

This deposition was taken by Mr. Stroup on February 16, 1981. During that deposition, Mr. Parker was asked, "Prior to the trial of Warren McCleskey did you have a file which you made available to defense counsel representing Warren McCleskey?" (Parker deposition at 4). Mr. Parker responded, "I had a file I made available to all the defense counsel in this case." Id. (emphasis added) It was again reiterated this was a file made available to defense counsel prior to and during trial. Thus, the file identified at the deposition was the file "that was made available back at pre-trial and trial." Id. at 5. (emphasis added). At no time is there any indication that this file included the matter which was the subject of the in camera inspection, but it was clearly stated that this was the matter given to defense counsel.

Further during the deposition, Mr. Stroup refers to a "statement" from Offie Evans. In response to a question concerning the statement, Mr. Parker clarified so that

counsel would be fully aware of the circumstances and stated, "When you refer to a statement, Offie Evans gave his statement but it was not introduced at the trial. It was part of that matter which was made in camera inspection (sic) by the Judge prior to trial." Id. at 8. Petitioner has asserted previously that this simply was unresponsive to the question. This does not undermine the fact that Mr. Parker specifically told counsel for the Petitioner in his deposition taken in the first state habeas corpus proceeding that there was a statement given by Offie Evans, and it was the statement which was the subject of the in camera inspection by the trial judge and it was clearly not a part of the file being turned over to Mr. Stroup at that point in time. To not understand that this refers to a written statement of Offie Evans is inexcusable neglect because the only way not to understand that is not to listen to Mr. Parker in the deposition or not go back and read the deposition after it has been prepared. At the end of the deposition, it was reiterated that there would be a copy provided of "the entire investigative file that was made available to counsel." Id. at 13 (emphasis added). It should be noted that during this deposition the only question asked of Mr. Parker relating to any type of Massiah claim was asked by the assistant attorney general and Mr. Stroup simply

failed to ask any questions whatsoever concerning this issue. In fact, the only testimony given by Mr. Parker on this point was, "I don't know of any instance where Offie Evans worked for the Atlanta Police Department as an informant prior to his overhearing conversations at the Fulton County Jail." Id. at 15. Mr. Stroup never pursued this question except to ask Mr. Parker concerning a possible deal with one of the police officers. Mr. Parker related that he did not see how anything such as that could have occurred. Id. at 18.

Counsel has asserted that all of the above specific references to written statements and to a written statement of Offie Evans was insufficient to put him on notice that there actually was a written statement. This is virtually incredible in light of the fact that the Georgia Supreme Court felt that there was some type of written statement and the fact that the state habeas corpus court in its order in the first state habeas corpus proceeding made the following specific factual findings:

> It is clear that defense counsel had access to the prosecution's discovery file which included statements from all witnesses (except Evans) and investigative reports. (H.T.38; Parker deposition, p. 4).

First state habeas corpus order at 9. (emphasis added).[2] This is a clear factual finding by the state court that there was actually a written statement from Offie Evans and this is a clear indication of the state habeas corpus court finding that all statements from all witnesses except for that statement given by Offie Evans were given to John Turner. Thus, the state habeas corpus court itself also specifically realized that there was a written statement from Offie Evans.

All of the above overwhelming indications of the existence a written statement by Evans and the clear statement by the Georgia Supreme Court that there was some type of written statement and the even clearer statement by Mr. Parker and the state habeas corpus court that there was a written statement, certainly belies any assertion that Petitioner's counsel had no basis for knowing of such a statement.

It is also clear that Petitioner had a legal basis for obtaining a copy of this statement in the first state habeas corpus proceeding or in the first federal habeas corpus proceeding. As was found in the second habeas

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[2]This order is included as an attachment to Exhibit H submitted to the district court and as Respondent's Exhibit No. 4 in the second state habeas corpus proceeding.

corpus proceeding by that court, "There is legal authority giving him the right to access to this document." Second state habeas corpus order at 13. That court found as fact, "There is no valid reason why Petitioner could not have obtained this statement earlier." Id. at 13. Certainly, Petitioner could have sought the statement earlier under the Georgia Open Records Act, could have subpoenaed the statement from Mr. Parker, could have asked for the state habeas corpus court to reopen the record so that he could subpoena the statement to a hearing before that court, could have asked for discovery from the district court in order to obtain that statement or could have requested the court to issue a subpoena for that statement. Petitioner simply failed to do anything to obtain the statement even though there are numerous legal avenues which he could have taken to obtain the statement at that time.

Contrary to Petitioner's assertions, the Eleventh Circuit Court of Appeals did recognize that the district made certain factual findings. The district court specifically found that McCleskey was not aware of a written statement and the Eleventh Circuit Court of Appeals recognized that this was not a clearly erroneous finding. McCleskey, 890 F.2d at 348. What the Eleventh Circuit Court of Appeals did was conclude that the

district court applied an erroneous legal principle. The Court specifically found that "the district court misconstrues the meaning of deliberate abandonment." Id. at 349. What the Eleventh Circuit Court of Appeals concluded was that counsel obviously had some factual basis for a Massiah claim at the time of the filing of the first petition as the issue was raised and "not only was counsel aware that Evans was in a cell next to McCleskey, (footnote omitted), but counsel was also aware that some sort of relationship existed between Evans and the police, as this formed the basis of McCleskey's Giglio claim." Id. The Court specifically concluded, and the district court did not find to the contrary, that counsel "made a knowing choice not to pursue the claim after having raised it previously." Rather than disputing the factual finding by the district court, what the Eleventh Circuit Court of Appeals did was take the factual findings and apply a correct legal standard examining a question of deliberate abandonment to conclude that counsel in fact specifically abandoned the claim. There can be no dispute that counsel was aware of the possibilty of such a claim as it was raised in the first state habeas corpus petition and counsel then deliberately chose not to pursue the claim in the first federal habeas corpus proceeding. Thus, the Eleventh Circuit Court of Appeals did not violate Rule 52(a) of the Federal Rules of Civil Procedure, but applied the clearly erroneous standard only to what were true factual findings.

Petitioner also asserts that the Eleventh Circuit Court of Appeals created some type of new standard with regard to abuse of the writ and issues that have been deliberately abandoned. Respondent asserts that the Eleventh Circuit did no more than apply a correct meaning to the terminology "deliberate abandonment". The Eleventh Circuit Court of Appeals did not reweigh factual evidence, but examined the facts as presented in the record in the district court in light of a correct legal standard. Perhaps the most telling fact which is not disputed by counsel is that had counsel made a simple inquiry at the jail at the time of the filing of the first state habeas corpus petition and probably even at the time of the filing of the first federal habeas corpus petition, the jail records would have been in existence which would specifically designate the cell assignments for each individual prisoner and could have offered unrebuttable proof of Mr. Evans' whereabouts on every day while he was incarcerated in Fulton County Jail. Thus, there would have been no necessity in relying on the memories of individuals testifying ten years after the occurrence of the events.

Petitioner also asserts that the state deliberately concealed the written statement of Offie Evans. Petitioner ignores that the fact that the written

statement of Offie Evans was not the basis upon which the district court found a Massiah violation. In fact, the written statement of Offie Evans had very little to do with the district court's finding of a Massiah violation. The only thing upon which the district court relied was the testimony of Mr. Worthy. Whether the Petitioner actually had a written statement of Offie Evans is immaterial to the Massiah violation found by the district court. Petitioner's assertions that there have been ten years of perjury and deceit are simply unsupported by the record and are not only disputed by the Respondent, but contradicted by every witness who testified before the district court with the exception of one individual who had absolutely no reason to remember these events.

Respondent submits that contrary to Petitioner's assertions, the state is fully entitled to assert abuse of the writ. The question is not whether there was a constitutional violation but whether the district court should have reached the merits of the allegation at all. Petitioner's argument would virtually preclude the assertion of abuse of the writ in almost every instance until there had been a determination as to the merits of the underlying claim. Based upon Petitioner's theory, abuse of the writ can only be found when there is no merit to the claim asserted. This would totally vitiate the

doctrine of abuse of the writ. Although courts have found an abuse of the writ partially by finding that there is no merit to the allegation raised, there is absolutely no requirement that the allegation be meritless before a federal court can find abuse of the writ.

It is clear that the basis utilized by the Eleventh Circuit Court of Appeals for finding an abuse of the writ is one that has long been recognized by this Court. As early as Sanders v. United States, 373 U.S. 1, 18 (1963), this Court acknowledged that an abuse of the writ could be found if one "deliberately withholds . . . grounds for federal collateral relief at the time of filing his first application. . . ." Furthermore, the Court went on to hold, "the same may be true if . . . the prisoner deliberately abandons one of his grounds at the first hearing." This serves one purpose of abuse of the writ doctrine, that is, to eliminate needless piecemeal litigation. Furthermore, this Court has also held, "successive petitions for habeas corpus that raise claims deliberately withheld from prior petitions constitute an abuse of the writ." Woodard v. Hutchins, 464 U.S. 377 (1984). See also Antone v. Dugger, 465 U.S. 200, 206 (1984) (noting, "as applicant had presented each of these claims to the state court before the first petition for habeas was filed . . . applicant hardly can contend that these claims were unknown to him at that time.").

The Eleventh Circuit Court of Appeals properly applied the precedent of that circuit and of this Court in concluding that Petitioner had done exactly what the abuse of the writ doctrine says he cannot do, that is, raise a claim at the first state habeas corpus proceeding and then deliberately choose not to raise it in the first federal habeas corpus proceeding and subsequently seek to raise it at a later proceeding. The failure to raise the claim in this case is particularly egregious when Petitioner was also raising a separate claim challenging the testimony of Offie Evans under Giglio v. United States, 405 U.S. 150 (1972), and when that very issue served as the basis for the same district court judge's initial reversal of the Petitioner's murder conviction and sentence in the first federal habeas corpus proceeding and that specific finding was reversed by the Eleventh Circuit Court of Appeals sitting en banc.

Respondent would thus submit that the Eleventh Circuit Court of Appeals properly found that the district court abused its discretion and that there was an abuse of the writ by Petitioner's having deliberately abandoned the allegation of the Massiah violation. The district court was incorrect in reaching the merits of the claim in the first instance and was incorrect in its legal analysis of the claim. Furthermore, the Eleventh Circuit Court of

Appeals was correct in its conclusion that counsel had not conducted a sufficient investigation so that the Court should ignore the deliberate abandonment of the claim. It should be noted ironically that counsel pursued a claim asserting discrimination in the application in the death penalty in his first federal application for habeas corpus relief when he did not even have completed studies at the time the petition was filed but only had the studies completed during the litigation on the first federal habeas corpus action. To assert that counsel simply chose not to raise this one issue because he did not find a sufficient factual basis to prove the claim does not undercut the fact that counsel simply did not present this issue to the district court for its resolution in the first federal habeas corpus action.

Respondent thus submits that as the Eleventh Circuit Court of Appeals applied the appropriate legal principles in making an evaluation of the abuse of the writ question, there exist no basis for the granting of certiorari by this Court.

II. THE HARMLESS ERROR ANALYSIS CONDUCTED BY THE ELEVENTH CIRCUIT COURT OF APPEALS IS NOT ESSENTIAL TO A RESOLUTION OF THE ABUSE OF THE WRIT QUESTION AND, FURTHERMORE, THE CONCLUSION BY THAT COURT THAT ANY ALLEGED ERROR WAS HARMLESS IS CORRECT.

Petitioner asserts two bases for this Court's granting review to examine what is simply an application of a harmless error rule. Petitioner first asserts that this Court should grant review to consider the application of Rule 52(a) to a harmless error analysis. Petitioner also asserts that the harmless error analysis conducted by the Eleventh Circuit Court of Appeals was incorrect.

Respondent would first assert that the harmless error analysis conducted by the Eleventh Circuit Court of Appeals was unnecessary to the resolution of the abuse of the writ question. The Eleventh Circuit Court of Appeals found an abuse of the writ by the deliberate abandonment of the claim. The Court then went on, however, to examine the question in light of an ends of justice analysis. Respondent would submit that this type of analysis is contemplated only in cases in which issues have been raised and litigated previously. In Kuhlmann v. Wilson, 477 U.S. 436 (1986), the Court did examine the

meaning of "ends of justice" but in the context of the question of relitigating issues, not in a context of addressing issues which had been deliberately abandoned. Respondent would submit that once an issue has been deliberately abandoned, the ends of justice analysis is simply not necessary.

Respondent would also submit that there exists no basis for this Court's granting review to simply examine a question of the applicability of the clearly erroneous rule under the circumstances of this case. Petitioner again focuses on purported findings by the district court while failing to point out that the only findings by the district court in relation to the harmless error analysis are derived strictly from the trial transcript, not from any live testimony presented before the district court. In fact, the district court itself specifically ignored prior findings by the Eleventh Circuit Court of Appeals sitting en banc. Under these circumstances, there was no reason why the Eleventh Circuit Court of Appeals could not rely on its own prior opinion and rely on exactly what it observed from the trial transcript in making a harmless error analysis. The district court's statements that certain things were testified to at trial did not amount to findings of fact, but simple citations from the transcript. The Eleventh Circuit Court of Appeals is fully capable of making its own citations to the transcript. The district court did not make any independent factual findings regarding trial testimony as

the district court did not have those witnesses before it for making any credibility assessments. Thus, Rule 52(a) simply is inapplicable.

Petitioner specifically asserts that the district court's holding violated Amadeo v. Zant, ___ U.S. ___ 108 S.Ct. 1771 (1988). Petitioner ignores the fact that in Ameado, the district court had live witnesses testifying in a habeas corpus proceeding and was not examining simply what took place at the trial of case. The error cited by this Court in Amadeo was the circuit courts's failure to apply the clearly erroneous rule to factual findings by the district oourt based on live testimony and to apply the rule to findings as to why an attorney engaged in a particular type of conduct. The Eleventh Circuit Court of Appeals in this case did not disagree with factual findings of this nature by the district court.

Petitioner primarily focuses on the purported finding by the district court that Offie Evans' testimony was critical to the state's case and the district court's purported findings that Ben Wright's testimony was obviously impeachable. Petitioner ignores the fact that these were precisely the considerations that the Eleventh Circuit Court of Appeals engaged in sitting en banc upon review of the first federal habeas corpus action. It was this holding by the Eleventh Circuit Court of Appeals that the district court in this case ignored in making its harmless error analysis. In fact, the

Eleventh Circuit Court of Appeals did not state that it disagreed with the district court's finding as to Ben Wright's testimony, but did specifically disagree with the conclusion as to the nature of Offie Evans' testimony, relying on its prior holding. Under these circumstances, the clearly erroneous rule of 52(a) simply does not come into play.

Respondent would further submit that the Eleventh Circuit Court of Appeals properly found that any alleged constitutional violation was harmless beyond a reasonable doubt. That Court acknowledged the distinction between examining an issue alleged to be a violation of Giglio v. United States and an issue alleged to be a violation of Massiah v. United States. The Court also noted the holding of this Court in Satterwhite v. Texas, 486 U.S. 249 (1988).

This Court has acknowledged that Sixth Amendment violations under certain circumstances may be subject to a harmless error analysis. See United States v. Morrison, 449 U.S. 361 (1981). The Eleventh Circuit Court of Appeals made a correct analysis of the harmless error question utilizing the standard of Chapman v. California, 386 U.S. 18 (1967). Respondent submits that as the Eleventh Circuit Court of Appeals applied the proper standard in making the harmless error analysis, this Court should decline to grant certiorari simply to review the conclusion as to whether any alleged error was harmless.

Petitioner and the district court conclude that Evans' testimony was critical to establish that the Petitioner was the triggerman and to establish malice. This is based on testimony by Evans that the Petitioner admitted shooting the policeman, stated he wore makeup during the robbery and stated he would have shot his way out even if there had been a dozen policemen. Ironically, Petitioner now refers to Offie Evans as an apparently disinterested witness at the trial of the case, when the Petitioner has consistently asserted just the opposite, that is, that based upon some type of deal or agreement for Mr. Evans' testimony he was not a disinterested witness and was in fact a biased witness.

The Eleventh Circuit examined first the testimony of Offie Evans regarding Petitioner's admission that he was the triggerman. The Court noted the state presented a substantial amount of circumstantial evidence relating to this aspect of the case.

> McCleskey himself confessed to his participation in the robbery. The officer was killed by the man who entered and secured the front of the store while the other three men were in the back. McCleskey was identified by two of the store personnel as the robber who came in the front door.

> The officer was killed by a bullet from a .38 caliber Rossi handgun. The state presented evidence that McCleskey had stolen a .38 caliber Rossi in a previous holdup. The gun that McCleksey had stolen had a white handle. The state presented testimony from an eyewitness that the robber who ran out the front door after the robbery was carrying a pearl-handled pistol.

McCleskey, 890 F.2d at 352.

The Court also noted that Ben Wright, the co-defendant, also testified that McCleskey was the triggerman. The Court concluded that the other evidence at trial was such that the Court could conclude that any additional testimony by Offie Evans did not contribute to the verdict.

The Court also examined Mr. Evans' testimony relating to the assertion that the Petitioner was wearing makeup. This was examined by the panel as well as by the en banc court and was found not to crucial to the state's case. This fact lent proof to the assertion that the Petitioner was the robber entering the front of the store. There was already testimony directly to this effect by Ben Wright as well as two eyewitnesses to the crime and was corrobated by the Petitioner's own confession. Thus, this one aspect of the testimony also could reasonably have been said not to contribute to the verdict.

Finally, the other assertion relates to the testimony by Offie Evans that the Petitioner would have been willing to shoot his way out if there had been twelve policemen. Again, this particular piece of testimony, if erroneously admitted, was harmless beyond a reasonable doubt. As noted by the Eleventh Circuit Court of Appeals, this was not focused upon in the prosecutor's closing argument as the prosecutor argued malicious intent based upon the physical evidence that the Petitioner shot the police officer once in the head and a second time in the chest as he was dying on the floor of the store, that the Petitioner had a choice to surrender but chose instead to kill the police officer, thus indicating malice as well as arguing the one statement from Mr. Evans. Thus, the evidence pertaining to malice was overwhelming and the testimony of Offie Evans did not contribute to the verdict on malice murder. Furthermore, Mr. Evans did not testify at the sentencing phase of the trial and the testimony of Evans was not used by the prosecutor during his argument concerning Petitioner to portray Petitioner as a malicious criminal, but rather the prosecutor focused on the prior convictions of Petitioner.

Under these circumstances, Respondent submits that the Eleventh Circuit properly concluded that any alleged error was harmless beyond a reasonable doubt and properly distinguished this case from the decision in Satterwhite v. Texas, in which

the critical testimony was from a psychiatrist. There this Court noted that the testimony was important because of the qualifications of the psychiatrist and because of the "powerful content of his message." Id. Contrary to Satterwhite, the testimony in this case did no more than corroborate other evidence already in the record and, thus, was harmless beyond a reasonable doubt.

Respondent submits that the Eleventh Circuit Court of Appeals properly conducted the harmless error analysis, recognizing the distinction between a Giglio issue and a Massiah issue and properly found that even if there were a Massiah violation, the admission of the testimony of Offie Evans was harmless beyond a reasonable doubt. As the Eleventh Circuit properly applied the precedent of this Court, there exists no basis for this Court granting review to simply consider a harmless error analysis.

CONCLUSION

WHEREFORE, for all of the above and foregoing reasons, Respondent prays that the petition for the writ of certiorari filed on behalf of Warren McCleskey be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Mary Beth Westmoreland, Attorney of Record for the Respondent, and a member of the Bar of the Supreme Court of the Unied States, hereby certify that in accordance with the Rules of the Supreme Court of the United States, I have served a copy of the foregoing Brief in Opposition for the Respondent upon opposing counsel by depositing same in the United States mail with sufficient, first class postage affixed thereto, and addressed as follows:

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This 27th day of April, 1990.

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Senior Assistant
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Supreme Court, U.S.
FILED
APR 23 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-7024

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1989

WARREN McCLESKEY,
Petitioner,

vs.

WALTER ZANT, Warden
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF OF AMICI CURIAE ALABAMA CAPITAL REPRESENTATION RESOURCE CENTER, VOLUNTEER LAWYERS' RESOURCE CENTER OF FLORIDA, and GEORGIA APPELLATE PRACTICE and EDUCATIONAL RESOURCE CENTER IN SUPPORT OF PETITIONER'S PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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INTEREST OF AMICI CURIAE

Amici Curiae -- Alabama Capital Representation Resource Center, Volunteer Lawyers' Resource Center of Florida, and Georgia Appellate Practice and Educational Resource Center (hereinafter "Resource Centers") -- aid in the post-conviction representation of death-sentenced inmates in states most directly affected by the Eleventh Circuit Court of Appeals' recent decision in McCleskey v. Zant, 890 F.2d 342 (11th Cir. 1989). The Resource Centers, established in part through the efforts of the federal judiciary and funded in part by the Judicial Council and the Criminal Justice Act, were created to help ensure that all death-sentenced inmates in Alabama, Florida, and Georgia are adequately represented in their post-conviction appeals.[1]

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1. Amici file this brief in support of Mr. McCleskey's Petition for Writ of Certiorari by written consent of all parties pursuant to Rule 37.3 of the Rules of this Court. The parties' letters of consent are on file with the Clerk of the Court.

The opinion in McCleskey v. Zant, 890 F.2d 342 (11th Cir. 1989), will severely impair the ability of the Resource Centers to accomplish the mission for which they were established: (1) to recruit additional, highly qualified volunteer counsel to represent capital inmates in state and federal collateral review proceedings; and (2) to provide resources to volunteer counsel -- such as assistance in investigating cases, identifying issues, researching petitions and briefs, and preparing for hearings -- to enable them to represent their clients zealously and effectively.

Recruitment of volunteer counsel will be impeded by McCleskey's requirement that volunteer counsel perform under a strict liability standard. The ruling in McCleskey requires volunteer counsel to: (1) identify every potential claim in a case, whether or not there is any available factual support whatsoever for the claim; (2) investigate each claim exhaustively, even if there have been

numerous representations and indications that the claim is factually unsupportable; (3) continue to assert identified claims for which counsel has been unable to garner factual support, because of the possibility that in the future, facts substantiating the claims -- which may even have been purposefully concealed by the State -- will be divulged; and (4) carry out these responsibilities whether or not counsel has the resources to do so or can obtain such resources from the courts. These conditions will make attorneys who might otherwise volunteer to represent a death-sentenced inmate extremely reluctant -- and outright frightened -- to do so.[2]

In addition, under the current staffing and funding levels of the Resource Centers, the McCleskey standard will force Resource

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2. Ethical standards such as F.R.Civ.P. 11 may require that claims be abandoned due to a lack of discovered factual support. Nevertheless, McCleskey requires that volunteer counsel -- in contravention of Rule 11 and without any guarantee that they will not be sanctioned under that Rule -- continue to assert baseless claims. See footnote 10, infra.

Centers to devote more time and resources to fewer cases in order to approach the goal of effective representation, since no case can be handled properly under McCleskey without an exponential increase in the amount of time and resources devoted to the case. Furthermore, the Resource Centers' goal of zealously and effectively protecting the constitutional rights of death-sentenced inmates will be seriously undermined by the lesson of the McCleskey decision: that states have absolutely no incentive voluntarily to comply with constitutional mandates and, instead, will be rewarded for illegally concealing constitutional violations with a judicial finding that, if the violation is hidden long enough, the death-sentenced inmate will not be heard to complain that he or she was denied basic safeguards guaranteed by our Constitution. The Resource Centers' distinctive role in the capital post-conviction representation process in the Eleventh Circuit makes amici curiae uniquely

situated to bring these concerns militating in favor of a grant of certiorari in this case to the attention of this Court.

SUMMARY OF ARGUMENT

The decision in McCleskey v. Zant, 890 F.2d 342 (11th Cir. 1989), will have far-reaching implications for the litigation of federal habeas corpus petitions by condemned prisoners. McCleskey imposes a strict liability standard on the performance of habeas counsel. The McCleskey court found that Petitioner abused the writ by not asserting his claim under Massiah v. United States, 377 U.S. 201 (1964) in his first federal habeas petition, although the court did not find that it was unreasonable or inexcusably neglectful for Petitioner not to have been aware of the factual substantiation for that claim -- which had been persistently concealed by the State -- at the time he filed his first federal habeas petition.

A strict liability standard is unprecedented as a means of determining the consequences of a criminal defendant's failure to discover factual bases for a claim. It is likewise at odds with settled abuse of the

writ principles and with the equitable underpinnings of the abuse of the writ doctrine. Moreover, the strict liability performance standard imposes an impossible burden on habeas counsel exhaustively to investigate every potential claim and to continue to assert claims even in the absence of available factual support.

McCleskey also creates a disincentive for states to voluntarily comply with constitutional mandates. The State concealed its violation of Petitioner's Sixth Amendment rights for nine years, despite diligent and repeated requests by Petitioner's trial and habeas counsel for any information which might reveal the violation. For its chicanery, the State was not merely unpunished, it was rewarded with a finding that Petitioner -- the innocent dupe in the State's ongoing scheme -- had abused the writ of habeas corpus by asserting the claim in a second federal habeas petition immediately after he serendipitously discovered the factual evidence that had long

been concealed by the State. This Court has refused to reward states' misconduct by procedurally barring petitioners' claims in the procedural default context, and it should likewise decline to condone state wrongdoing in the abuse of the writ setting.

ARGUMENT

I. THE DECISION IN McCLESKEY V. ZANT, 890 F.2d 342 (11TH CIR. 1989), IMPOSES A STRICT LIABILITY STANDARD OF PERFORMANCE ON FEDERAL HABEAS COUNSEL WHICH IS NOT ONLY UNPRECEDENTED, BUT ALSO IMPOSSIBLE TO MEET WITHOUT AN INFUSION OF ADDITIONAL RESOURCES FAR IN EXCESS OF THOSE NOW AVAILABLE TO ATTORNEYS REPRESENTING HABEAS PETITIONERS

As Mr. McCleskey's Petition for Writ of Certiorari points out, the lower court's opinion in McCleskey v. Zant, 890 F.2d 342 (11th Cir. 1989), reinterprets the "abuse of the writ" doctrine to hold federal habeas petitioners, and their attorneys, strictly liable for any failure to discover factual support for a claim during a first federal habeas petition, regardless of the reason for that failure. See Petition for Writ of Certiorari at 28-31. The Eleventh Circuit Court of Appeals found that Petitioner abused the writ of habeas corpus by not including his claim under Massiah v. United States, 377 U.S. 201 (1964), in his first federal habeas petition, even though at the time the first

petition was filed, Petitioner and his attorneys did not know, and had no reason to know, that there was factual support for the claim.[3]

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3. After the conclusion of Petitioner's first federal habeas corpus proceedings, habeas counsel fortuitously discovered evidence clearly establishing a Massiah violation. See Petition for Writ of Certiorari at 13 & n.8. The facts proving the violation -- although concealed by the State for nine years -- were never seriously disputed after they were revealed. Petitioner and three co-defendants were arrested for a robbery during which a police officer was killed. In an effort to discover which of the four participants killed the officer, the victim's fellow officers launched a scheme to procure an illegal confession from Petitioner. Several detectives met with a known jailhouse informer, Offie Evans, and a jailer, Ulysses Worthy, at the Fulton County Jail where Petitioner was confined. During that meeting, the detectives asked Mr. Worthy to move informer Evans from another part of the jail into a cell adjacent to Petitioner's cell. The detectives then arranged for Evans to elicit a "confession" from Petitioner, by coaching Evans about how to approach Petitioner and giving Evans critical facts about the crime unknown to the general public. See Petition for Writ of Certiorari at 3-6; McCleskey v. Zant, Civil Action No. C87-1517A (N.D.Ga. Dec. 13, 1987) at 23-30.

Pursuant to the conspiracy, Evans was transferred to a cell next to Petitioner's and engaged Petitioner in conversation. Eventually, Evans reported all that he had purportedly learned from Petitioner,

(continued...)

The McCleskey court did not examine whether counsel's ignorance of the facts supporting Petitioner's Massiah claim at the time of the first federal habeas proceedings resulted from an unreasonably sub-standard attorney performance in investigating the claim.[4] Rather than analyzing whether

---

3. (...continued) including an alleged confession to the shooting, to an Assistant District Attorney. Evans also recorded his tactics and the results in a stunning 21 page statement to police officials. The information obtained by Evans from Petitioner was the key evidence used against Petitioner at his trial, and the basis for Petitioner's conviction for malice murder and sentence of death. See Petition for Writ of Certiorari at 15-19; McCleskey v. Zant, Civil Action No. C87-1517A (N.D.Ga. Dec. 13, 1987) at 29-31. Evans' relationship with the police and the existence of his 21 page written statement were concealed by the State for nine years after Petitioner's trial, despite repeated attempts by Petitioner's trial and habeas counsel to obtain such information. See Petition for Writ of Certiorari at 8-14, 29-30 n.16.

4. The District Court specifically found that reasonably competent counsel could not have discovered the evidence supporting Petitioner's Massiah claim at the time the first federal habeas petition was filed. See Order in McCleskey v. Zant, Civil Action No. C87-1517A (N.D.Ga. Dec. 13, 1987) at 25; Petition for Writ of Certiorari at 30. Mr. McCleskey's Petition for Writ of Certiorari details the arduous efforts of counsel to

(continued...)

counsel's failure to discover the key evidence of a Massiah violation was the product of inexcusable neglect, a lack of due diligence, or a failure to undertake reasonable investigation, the Eleventh Circuit Court of Appeals determined that assertion of the Massiah claim in a second federal habeas petition was abuse of the writ simply because counsel purportedly could have discovered the evidence earlier. McCleskey v. Zant, 890 F.2d at 348-50. The fact that evidence in support of the Massiah claim ultimately surfaced during the second federal habeas proceeding convinced the court that the evidence was discoverable at an earlier time.[5] Without

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4. (...continued)
obtain factual support for the claim prior to filing the first federal habeas petition, see e.g., p. 8-14, 29-30 n.16, all of which were impeded by -- viewed in the most generous light -- "misrepresentations" by a variety of state actors, which resulted in the concealment of evidence crucial to the Massiah claim for nine years.

5. Even under the court's improper "could have discovered" standard -- which wholly ignores the reasonableness and diligence of counsel's earlier search for factual substantiation of a Massiah violation
(continued...)

finding counsel's initial investigation of the claim unreasonable or incompetent, the court concluded that Petitioner had abused the writ because counsel's early investigative efforts were "somewhat lacking" and counsel could have engaged in a "more extensive effort at th[e time of the initial petition] to track down persons with information." McCleskey, 890 F.2d at 349-350 (emphasis added).[6]

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5. (...continued)
-- it is not at all clear that Petitioner abused the writ. Because the State persistently concealed the evidence, see e.g., Petition for Writ of Certiorari at 8-14, counsel's investigatory efforts, no matter how thorough, may not have uncovered the crucial information before the first federal habeas petition was filed. Counsel was only able to discover the critical piece of evidence after a change in the Georgia Open Records law which occurred after the first federal habeas proceeding. See Petition for Writ of Certiorari at 13 & n.8. That one piece of evidence ultimately led, through a long and tortuous path, to the discovery of the clear Massiah violation in Petitioner's case. Id. at 13-14.

6. An analytical framework for assessing the reasonableness of counsel's decision not to undertake additional investigation was developed by the Eleventh Circuit Court of Appeals in Foster v. Dugger, 823 F.2d 402, 405 (11th Cir. 1987), cert. denied, 108 S.Ct. 2915 (1988):

(continued...)

In so holding, the Eleventh Circuit Court

6. (...continued)

> When assessing a decision not to investigate, we must make 'every effort . . . to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time.' Strickland v. Washington, 466 U.S. at 689. Counsel need not 'pursue every path until it bears fruit or until all available hope withers.' Solomon v. Kemp, 735 F.2d 395, 402 (11th Cir. 1984) (quoting Lovett v. Florida, 627 F.2d 706, 708 (5th Cir. 1980)); see also Washington v. Watkins, 655 F.2d 1346, 1356 (11th Cir. Unit A 1981), cert. denied, 456 U.S. 949 (1982). The appropriate legal standard is not error-free representation, but 'reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.' Strickland v. Washington, 466 U.S. at 691, 104 S.Ct. at 2066; see also Darden v. Wainwright, 477 U.S. 187 (1986). Accordingly, it is necessary to review those factors that influenced [counsel's] decision to forego further investigation . . .

Under this standard, counsel's decision to cease his considerable investigation of the Massiah violation in Petitioner's case - an entirely fruitless investigation due to the State's successful concealment of the necessary evidence -- was eminently reasonable. Those formidable efforts, and their futility, are detailed in Mr. McCleskey's Petition for Writ of Certiorari at 8-14, 29-30 n.16, and will not be repeated here.

of Appeals applied a "strict liability" standard to gauge the performance of habeas counsel: "the principle that in some cases the defendant may be held liable, although he . . . has not . . . departed in any way from a reasonable standard of intent or care." W. Prosser, Law of Torts § 75 at 494 (4th ed. 1971). Under the ruling in McCleskey, habeas counsel has the burden of conducting more than reasonable investigation, more than competent investigation, and more than diligent investigation: counsel must conduct successful investigation -- regardless of the impediments strewn in his or her path -- or forever relinquish a claim. The repeated early efforts of Petitioner's counsel to secure factual support for his Massiah claim, all thwarted by State misconduct and concealment of the evidence, see Petition for Writ of Certiorari at 8-14, were insufficient for abuse of the writ purposes simply because they were unsuccessful, according to McCleskey.

Concededly, a more exhaustive investigation, in which every person who remotely might have known of the facts establishing Petitioner's Massiah violation was interviewed, might have uncovered the evidence earlier.[7] However, such an investigation has never before been required in any other criminal law context where counsel fails to discover evidence. Counsel's failure to discover the factual basis for a claim is never gauged simply by demonstrating that, through a more extensive investigation, counsel could have discovered the evidence. Instead, the question is whether counsel should have undertaken the additional investigation necessary to find the evidence, measured by a "reasonableness" or "due diligence" standard. The McCleskey court omitted this crucial analytical step, and instead established a new rule requiring habeas counsel to "pursue every path until it bears fruit or until all available hope withers." Solomon v. Kemp, 735 F.2d 395, 401 (11th Cir. 1984)(quoting Lovett v. Florida, 627 F.2d 706, 708 (5th Cir. 1980)).

This requirement -- strict liability for failure to discover evidence regardless of the reasons for that failure -- is unprecedented, at odds with governing abuse of the writ principles, and unworkable. In no other criminal law context is counsel required to meet such a standard of performance. For example, in representing a criminal defendant, counsel's performance need only be reasonable. Strickland v. Washington, 466 U.S. 668 (1981).

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7. For the argument that the evidence was simply undiscoverable, see footnote 5, supra. In Petitioner's case, a thoroughly exhaustive investigation would have required interviewing hundreds of jailers in an indiscriminate attempt to find the one who might have information, see Petition for Writ of Certiorari at 10-11 n.6, even before the critical fact raising suspicions of a Massiah violation -- the 21 page statement of informer Offie Evans -- had been revealed. The statement was discovered only after a change in Georgia's Open Records law which occurred after the first federal habeas proceeding. See footnote 5, supra. Before he had the statement, counsel did in fact interview the few jailers whom he was told would be most knowledgeable about the situation. Petition for Writ of Certiorari at 10.

To secure a new trial on the basis of evidence newly discovered after trial, counsel need only show that his or her failure to discover the evidence earlier was not due to a failure to exercise due diligence. See 3 A. Amsterdam, Trial Manual 5 for the Defense of Criminal Cases § 457, at 281-82 (1989)(noting that the due diligence standard is a "time-honored" component of the criteria for obtaining a new trial based on newly discovered evidence). To overcome a procedural default created by counsel's ignorance of facts material to a claim, counsel need only "show[] that the factual . . . basis for a claim was not reasonably available to counsel. . . ." Murray v. Carrier, 477 U.S. 478, 488 (1986); see also Amadeo v. Zant, 486 U.S. ___, 108 S.Ct. 1771 (1988)(applying the Carrier rule).

Moreover, settled abuse of the writ principles are manifestly in conflict with a strict liability performance standard. Ironically, the McCleskey court itself cited

these long-standing principles, before ignoring them:

> Once the state has alleged abuse of the writ, the petitioner must be afforded the opportunity to justify his previous failure to raise the claim. In deciding whether a petitioner has presented sufficient justification, courts have required the petitioner to show that he did not deliberately abandon the claim and that his failure to raise it was not due to inexcusable neglect. See Woodard v. Hutchins, 464 U.S. 377, 379, 104 S.Ct. 752, 753, 78 L.Ed.2d 541 (1984)(per curiam)(Powell, J., concurring, joined by four other justices); Demps v. Dugger, 874 F.2d 1385, 1391 (11th Cir. 1989), petition for cert. filed, No. 89-5277, 1989 WL 113448 (Aug. 4, 1989); Witt v. Wainwright, 755 F.2d 1396, 1397 (11th Cir.), cert. denied, 470 U.S. 1039, 105 S.Ct. 1415, 84 L.Ed.2d 801 (1985); Potts v. Zant, 638 F.2d 727, 740-41 (5th Cir. Unit B 1981), cert. denied, 454 U.S. 877, 102 S.Ct. 357, 70 L.Ed.2d 187 (1981).

McCleskey, 890 F.2d at 347. This standard, as interpreted by the Eleventh Circuit prior to McCleskey, forgives federal habeas counsel's failure to raise a claim in a prior federal petition when the legal or factual basis of the claim was unknown, so long as "reasonably competent counsel" would not have been aware

of the basis for the claim. Moore v. Zant, 885 F.2d 1497, 1506 (11th Cir. 1989)(en banc). Counsel who, like Petitioner's counsel, (1) conducts a reasonable, though less than fully exhaustive, investigation, see footnote 4, supra; (2) fails as a result to discover the facts necessary to establish a claim, see id. and footnote 5, supra; and (3) for this reason does not raise the claim in an earlier petition, see Petition for Writ of Certiorari at 12, should not and cannot be held to have abused the writ or deliberately abandoned the claim[8] when facts material to the claim -- which had been hidden by the State -- are later discovered and the claim is immediately presented in a subsequent petition.

The strict liability standard is also at odds with the equitable underpinnings of federal courts' power to dismiss habeas corpus petitions. See McCleskey, 890 F.2d at 346. "In cases of abuse of the writ, equity

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8. See Petition for Writ of Certiorari at 29-30.

counsels against allowing 'needless piecemeal litigation' or 'collateral proceedings whose only purpose is to vex, harass, or delay.'" Id. (citation omitted). Conversely, equity must require that petitioners be permitted to present successive petitions which do not constitute needless piecemeal litigation or are not filed only to vex, harass, or delay. Equitable principles dictate that, in some circumstances, federal courts be willing to find that a habeas petitioner's counsel had previously done "enough" to investigate a claim, such that failure to discover facts substantiating the claim earlier does not bar successive presentation of the claim upon ultimate discovery of the necessary facts.

The imposition of a strict liability performance standard for habeas counsel is not only unprecedented and contrary to governing principles of law, it is also utterly impossible to accommodate. If the Eleventh Circuit Court of Appeals' analysis in McCleskey is the law, the task of habeas

counsel in investigating potential constitutional claims is staggering. Every potential claim depending on non-record evidence in every case must be investigated until substantiating evidence is found (even if that evidence is being hidden by the State), or until there is no other conceivably material witness to interview or conceivably material document to obtain.[9] Even then, habeas counsel cannot abandon the claim, because such abandonment would foreclose future litigation of the claim if new, unthought-of evidence thereafter became available. No lawyer providing zealous representation to a death-sentenced inmate could take such a risk. Thus, the notion of reasonable attorney judgments about the scope of investigation and the viability of claims

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9. In Petitioner's case, this would have required interviewing several hundred jailers who worked at the Fulton County Jail where Petitioner was incarcerated, because the key document suggesting a Massiah violation was persistently withheld by the State. See Petition for Writ of Certiorari at 10-11 n.6.

will evaporate, and, with its demise, the cost of litigating each death penalty habeas case will go up exponentially.[10]

Under the McCleskey strict liability standard, every case will now consume far more resources than are presently available. It is impossible to determine the long-term consequences of such a rule, but, for the present, radical changes will be required in the operation of the amici curiae Resource

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10. In addition to monetary costs, the burden on federal courts reviewing habeas petitions, and volunteer attorneys presenting them, will increase substantially. By essentially prohibiting abandonment of non-record evidence claims, the McCleskey rule will force the courts and counsel to wade through numerous as yet unsubstantiated claims in every federal habeas petition. Moreover, presenting such claims will pose an ethical dilemma for volunteer counsel. Counsel cannot comply with the mandate of McCleskey to continue presenting claims with no factual support and the mandate of Fed.R.Civ.P. 11, requiring counsel to certify that claims presented to the federal court are "well grounded in fact." Volunteer counsel will be forced to choose between the life of a death-sentenced prisoner and the possibility of severe sanctions for unethical conduct. These burdens on counsel and the courts are critical components of the "cost" equation which must be considered in evaluating the McCleskey standard.

Centers in the Eleventh Circuit. The number of cases in which amici curiae provide assistance to volunteer counsel necessarily will be severely reduced, so that resources can be focussed on attempting to comply with the strictures of McCleskey in at least some cases. Investigative resources and staff attorney time now available to all volunteer counsel will be redirected to this reduced caseload, leaving volunteer counsel to whom amici curiae Resource Centers can no longer devote resources to fend for themselves, without significant support from, or consultation with, the Resource Centers. Inevitably, these "abandoned" volunteer counsel will be forced to ask the federal courts for heretofore unheard of financial assistance to comply with McCleskey.[11]

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11. This assumes that volunteer counsel will continue to come forward. It is not unimaginable that the pool will quickly dry up when prospective volunteer counsel learn that they bear the burden of representing a death-sentenced inmate under a strict liability performance standard, and the burden of risking Fed.R.Civ.P. 11 sanctions for operating within the dictates of (continued...)

Ironically, the Eleventh Circuit Court of Appeals' decision in McCleskey comes at a time of national focus on the conduct of capital federal habeas corpus proceedings. The Ad Hoc Committee on Federal Habeas Corpus in Capital Cases of the Judicial Conference of the United States ("Powell Committee"), the American Bar Association Task Force on Death Penalty Habeas Corpus, Congress, this Court, and other federal courts have become acutely concerned about chaos, unfairness, and inefficiency in capital federal habeas corpus. The new McCleskey standard -- even if it were at all supportable as a legal principle -- has extraordinary potential to significantly magnify the chaos, unfairness, and inefficiency that currently plague these cases.

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11. (...continued)
McCleskey. See footnote 10, supra. McCleskey may well demand too much of lawyers who provide their services as volunteers to meet a need which is universally -- but not constitutionally -- recognized.

II. THE DECISION IN McCLESKEY V. ZANT, 890 F.2d 342 (11TH CIR. 1989), UNDERMINES INCENTIVES FOR STATES TO COMPLY WITH CONSTITUTIONAL MANDATES AND ENCOURAGES STATES TO CONCEAL VIOLATIONS OF CAPITAL DEFENDANTS' CONSTITUTIONAL RIGHTS BY REWARDING THEM FOR DOING SO

In its McCleskey opinion, the Eleventh Circuit Court of Appeals turned a blind eye to the State's misconduct in violating, and then concealing the violation of, Petitioner's Sixth Amendment rights. By imposing a strict liability standard for habeas counsel, the court placed the burden of Petitioner's failure to uncover the facts substantiating his Massiah claim wholly on Petitioner, even though those facts were continually concealed by the State for nine years. See Petition for Writ of Certiorari at 8-14. The inevitable result of the McCleskey ruling will be to undermine states' incentives to comply voluntarily with constitutional mandates and to encourage states to conceal violations of capital defendants' constitutional rights.

Like all constitutional principles regulating the conduct of state authorities,

those established to protect the rights of criminal defendants depend heavily upon voluntary compliance by state actors. For example, investigating police officers are expected to obey the rule of Massiah; if they do not, state prosecutors are expected either not to offer the resulting confession into evidence, or to offer the confession with disclosure to defense counsel of a possible Sixth Amendment violation. This Court has long recognized the expectation that prosecutors will disclose evidence that is favorable to the defense:

> [F]or the prosecutor's role transcends that of an adversary: he "is the representative not of an ordinary party to a controversy, but of a sovereignty . . . whose interest . . . in a criminal prosecution is not that it shall win a case, but that justice shall be done."

United States v. Bagley, 473 U.S. 667, 675 (1985) (quoting Berger v. United States, 295 U.S. 78, 88 (1935)). No one -- not criminal defendants, not the judicial system, not society as a whole -- is benefitted by

creating disincentives, such as the one created by the Eleventh Circuit Court of Appeals in McCleskey, for state actors to conform to the expectations imposed upon them by the Constitution.

The expectation that police and prosecutors will voluntarily honor the constitutional rights of criminal defendants -- and thus serve the higher goal of justice -- will be seriously undermined if McCleskey is allowed to stand. The McCleskey rule insulates police and prosecutors from the adverse consequences of their misconduct in violating, and then hiding the violation of, a defendant's rights. Rather than encouraging voluntary compliance with the Constitution, McCleskey provides an incentive not to comply. Indeed, McCleskey rewards the police and prosecutors for non-compliance so long as they conceal the constitutional violation through the course of first federal habeas proceedings, by prohibiting the habeas petitioner from later obtaining relief for the

violation when it is ultimately uncovered. An important sanction for non-compliance with constitutional mandates -- federal habeas corpus relief -- is removed by McCleskey.[12] McCleskey's tolerance of, and reward for, state non-compliance with constitutional directives will seriously impede amici curiae

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12. The damage McCleskey will cause to the equitable balance struck by habeas corpus is well illustrated by the facts of McCleskey itself. During his first state habeas proceeding, in which Petitioner asserted his Massiah claim, Petitioner's investigative efforts were thwarted by the State's persistent concealment of the Massiah violation: (1) Although the State purported to provide Petitioner with the complete prosecutorial file, that file did not include the 21 page "transcript" of informer Offie Evans' conversations with Petitioner, which so clearly suggested a Massiah violation; (2) The prosecutor testified in a deposition that, to his knowledge, the State had no informant relationship with Evans at the time Evans allegedly obtained inculpatory statements from Petitioner; and (3) Evans himself denied such a relationship during testimony at the state habeas hearing. Moreover, when the officers involved in the Massiah violation were later interviewed, they persisted in denying any knowledge of the scheme. For the nine years the State concealed its violation of Petitioner's Sixth Amendment rights, the State was rewarded with a finding that Petitioner abused the writ by asserting his Massiah claim in a second federal habeas petition immediately after he ultimately discovered the State's misconduct.

Resource Centers from fulfilling their ultimate purpose: to protect the constitutional rights of death-sentenced inmates.

Indeed, this Court has recognized the risks of a rule such as McCleskey imposes, and firmly held that state misconduct can preclude imposition of a procedural bar to consideration of the merits of a constitutional claim in the context of procedural default. In Amadeo v. Zant, 486 U.S. ___, 108 S.Ct. 1771 (1988), the Petitioner was unaware of the facts supporting a jury composition challenge because those facts were in a memorandum hidden among reams of jury lists in the clerk's office. This Court held that

> [i]f the District Attorney's memorandum was not reasonably discoverable because it was concealed by Putnam County officials, and if that concealment, rather than tactical considerations, was the reason for the failure of petitioner's lawyers to raise the jury challenge in the trial court, then petitioner established ample cause to excuse his procedural default under this Court's precedents. The situation . . . fits squarely, indeed almost verbatim, within our holdings in [Reed v.]Ross[, 468 U.S. 1 (1984)] and [Murray v.]Carrier[, 477 U.S. 478 (1986)].

Amadeo, 108 S.Ct. at 1777.

This Court in Amadeo recognized what the Eleventh Circuit Court of Appeals failed to acknowledge in McCleskey: that if the State plays a role in making the discovery of a constitutional violation "'impracticable'" after "'reasonabl[e]'" investigative efforts by defense counsel, Amadeo, 108 S.Ct. at 1776 (quoting Murray v. Carrier, 477 U.S. 478, 488 (1986)), the State -- not the defendant -- must bear the burden of the defendant's failure to raise the claim earlier; the State -- not the defendant -- will be penalized under the procedural rules governing when the merits of a claim may be considered. If the delicate balance of our constitutional system is to be maintained, the same rule applied by this Court in the procedural default context must be applied to abuse of the writ.

CONCLUSION

For the foregoing reasons, and the reasons detailed in Mr. McCleskey's Petition for Writ of Certiorari, this Court should grant certiorari to review the decision of the Eleventh Circuit Court of Appeals in McCleskey v. Zant, 890 F.2d 342 (11th Cir. 1989).

Respectfully submitted,

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FILED
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(5)

No. 89-7024

In The

Supreme Court of the United States

October Term, 1990

WARREN McCLESKEY,

Petitioner,

vs.

WALTER D. ZANT, Superintendent,
Georgia Diagnostic & Classification Center,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

JOINT APPENDIX

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CERTIORARI GRANTED JUNE 4, 1990

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7/7/87	PETITION for writ of habeas corpus with request, to proceed in forma pauperis with ORDER by Judge J. O. Forrester GRANTING request.
7/7/87	MOTION by petitioner Warren McCleskey for discovery with attachments.
7/7/87	MOTION by petitioner Warren McCleskey for stay of execution with attachments.
7/8/87	(yrm)
7/8/87	Response by respondent Ralph M. Kemp to petition for Writ of Habeas corpus with brief in support.
7/8/87	RESPONSE by respondent Ralph M. Kemp motion for discovery by Warren McCleskey.
7/8/87	SUBMITTED to Judge J. O. Forrester on motion for stay of execution by Warren McCleskey, motion for discovery by Warren McCleskey, order, petition for writ of habeas corpus.
7/8/87	Affidavit of John Boger & Robert Stroup filed.
7/8/87	HEARING held on petition for writ of habeas corpus before Judge J. O. Forrester. Affidavits of John C. Boger & Robert H. Stroup filed. Order directing respondent to produce petitioner for hrg. filed (executed by state) * * * R. Stroup, R. Parker, C. Hamilton & W. Harris sworn & testified. Pltf. exhs 3,4,5,6,7,8,9 ADMITTED.
	* * *
7/9/87	HEARING continued on petition for writ of habeas corpus. Pltf's exh 10 ADMITTED.

Court verbally stayed the execution of petitioner set for 7/14/87 pending further evidentiary hrg to be held the first week in August.

7/10/87 ORDER GRANTING motion for stay of execution McCleskey.

* * *

8/5/87 MOTION by petitioner Warren McCleskey to prohibit recall of witnesses with brief in support.

8/10/87 Evidentiary hearing resumed from July 9, 1987.

8/10/87 RESPONSE by respondent Ralph M. Kemp in opposition to motion to prohibit recall of witnesses by Warren McCleskey.

8/17/87 ORDER Federal Public Defender Program, Inc. is appointed to represent plft. (sic) by Judge J. O. Forrester.

* * *

12/23/87 ORDER GRANTING IN PART AND DENYING IN PART petition for writ of habeas corpus (see order) DENYING motion for discovery by Warren McCleskey GRANTING motion to exceed page limit by Warren McCleskey.

12/23/87 JUDGMENT ENTERED for petitioner Warren McCleskey against respondent, Ralph M. Kemp, Warden directing the respondent to retry petitioner within 120 days from receipt of the 12/13/87 nunc pro tunc for 12/23/87.

* * *

1/15/88 NOTICE OF APPEAL from order by respondent Ralph M. Kemp.

1/15/88 MOTION by respondent Ralph M. Kemp for stay of execution with brief in support.

1/21/88 NOTICE OF CROSS-APPEAL by petitioner Warren McCleskey.

1/27/88 Certificate of probable cause requested by petitioner with memo in support and proposed order.

2/3/88 SUBMITTED to Judge J. O. Forrester on probable cause certificate/certification and MOTION for stay of judgment.

3/8/88 ORDER DIRECTING that there exists probable cause to appeal by Judge J. O. Forrester filed.

3/9/88 ORDER GRANTING motion for stay of execution by Ralph M. Kemp staying judgment until the issuance of the mandate of the 11th Circuit Court of Appeals and until that mandate is made the judgment of this court, thereby completing the appellate process by Judge J. O. Forrester.

* * *

5/6/88 MOTION by respondent Ralph M. Kemp for relief from final judgment pursuant to Rule 60(B) with brief in support.

5/13/88 RESPONSE by petitioner Warren McCleskey to motion for relief from final judgment pursuant to Rule 60(B) by Ralph M. Kemp.

5/23/88 SUBMITTED to Judge J. O. Forrester on motion for relief from final judgment pursuant to Rule 60(B) by Ralph M. Kemp.

6/3/88 Application for leave of absence of James M. Nabrit III from 7/7/88 thru 7/28/88.

6/17/88 ORDER ALLOWING extension of discovery until 8/1/88 on the two issues of due diligence and of Officer (sic) Evans' knowledge in reference to the respondent's motion for relief from final judgment pursuant to Rule 60(b);

response time for paper discovery is shortened to 15 days; if a dispute arises during discovery, parties are DIRECTED to seek a conference by Judge J. O. Forrester.

8/2/88 SUPPLEMENTAL BRIEF by respondent Ralph M. Kemp motion for relief from final judgment pursuant to Rule 60(B) by Ralph M. Kemp.

8/11/88 Reply brief in response to respondent's supplement to motion for relief from final judgment uner (sic) Rule 60(b) by petitioner Warren McCleskey.

8/11/88 Amendment (2nd) motion to expand the record by petitioner Warren McCleskey.

8/25/88 SUBMITTED to Judge J. O. Forrester on motion to expand the record by Warren McCleskey.

1/10/89 ORDER GRANTING motion to expand the record by Warren McCleskey and respondent's motion for relief from final judgment is DENIED by Judge J. O. Forrester.

1/30/89 NOTICE OF APPEAL from order by respondent Ralph M. Kemp.

PRETRIAL MOTION –
Superior Court Fulton Co. GA.
(Crim. No. A-40553)

IN THE SUPERIOR COURT OF FULTON COUNTY

STATE OF GEORGIA

STATE OF GEORGIA	)	
	)	INDICTMENT
versus	)	NO. A-40553
WARREN MCCLESKY, et al	)	

MOTION FOR INFORMATION NECESSARY TO RECEIVE A FAIR TRIAL

Now Comes the defendant in the above-stated case, without waiving formal arraignment and moves the Court to require the State through the District Attorney of this Circuit to produce at the trial of the above-styled case, and at any and all non-jury hearings of the above-styled case, the following documents, pictures and articles:

-1-

Copies of all reports and memoranda connected with the said charge against the named defendant.

-2-

All written statements of witnesses in the possession of the prosecutor relating to the charges against the named defendant in the above-styled case, as well as all statements relating to any other defendants in the above-styled case.

* * *

-4-

Statements of all persons including memoranda, summaries recordings of such statements of any person, made to any law enforcement officer or the investigative staff of any prosecute (sic) in any way connected with the above-styled case.

* * *

-8-

All written or recorded statements and all summaries or memoranda of any oral or written statements made by the named defendant and all other defendants named in the above-styled case.

* * *

In support of his motion, defendant states:

The aforesaid documents are in the possession of the State are available to the District Attorney.

All of said documents, pictures and articles are relevant, significant and constitute substantial material evidence and will be useful to and favorable to the named defendant as evidence upon his trial.

The named defendant cannot safely go to trial in this case without the production of said document and in their absence will be denied due process of law as guaranteed by Article I, Section Paragraph III, of the Constitution of the State of Georgia (Ga. Code §2-103) and the Fourteenth Amendment to the Constitution of the United States.

Without the production of the documents referred above, the defendant's counsel will not be able to effectively represent him in the above-styled case; and thus the defendant will be denied the right of counsel which is guaranteed to him under the provisi (sic) of Article I, Section I, Paragraph V of the Georgia Constitution (Ga. Code §2-105) and the Sixth and Fourteenth Amendment to the United States Constitution.

WHEREFORE, the defendant prays:

(a) That the State be required to produce all documents and other evidence referred to above.

(b) Without waiving his right to have his counsel examine siad (sic) documents, pictures and articles, if the Court does not perr (sic) this to be done, that the Court conduct an *in camera* examination of said documents, pictures and articles and his counsel be permitted to see and copy of (sic) reproduce any of said documents, pictures and articles favorable to the named defendant as to the question of guilt or punishment or for the purpose of impeaching any of the witnesses to be called by the State in the trial of the named defendant.

(c) That if any part of said documentary evidence isn't made available to the named defendant prior to the commencement of his trial, then without waiving his right to the production of said evidence prior to his trial, he respectfully moves the Court for an order directing the District Attorney to produce all statement and other impeaching evidence of each witness testifying for the State at the conclusion of the direct examination of that particular witness and in sufficient time so that said

material will be available to counsel for defendant to use while cross-examining the particular witness.

(d) Without in any way waiving the right of this defendant to have his counsel examine said documents, pictures, and article prior to trial and to have his counsel examine all of said documents relating to the impeachment of each witness before cross examining that particular witness, this defendant without waiving his right to have said material produced earlier, moves the Court for an order directing the District Attorney to produce all such documents and evidence and to submit the same to his counsel at the close of the State's evidence.

Respectfully submitted,

SILVER, ZEVIN, SEWELL & TURNER

JOHN M. TURNER, II
Attorney for Defendant

ORDER
Superior Court, Fulton Co. GA.
(Crim. No. A-40553)

(Caption Omitted In Printing)

ORDER

The above-captioned matter came before this Court on September 25, 1978.

After conducting an in camera inspection of certain items of evidence in the State's possession, the Court finds that although the documents might become material for rebuttal at trial, they are not now subject to discovery.

It is further ordered that counsel may, at the proper time, ask the Court for a further ruling if the circumstances make it appropriate to do so.

IT IS SO ORDERED.

This 27 day of September, 1978.

/s/ Sam Phillips McKenzie
SAM PHILLIPS McKENZIE
JUDGE, SUPERIOR COURT
ATLANTA JUDICIAL CIRCUIT

TRIAL TRANSCRIPT

Superior Ct., Fulton Co. Ga.
(Crim. No. A-40553)

October 9, 1978

(Caption Omitted In Printing)

* * *

[BY DEFENSE ATTORNEY JOHN TURNER]:

[631] Q You say you have seen Mr. McClesky with a silver pistol before, is that right?

A [BY MARY JENKINS]: Yes.

Q Have you ever seen anybody else with that gun?

A No.

Q Do you recall telling the police that you saw Mr. Wright with that gun?

A Well, I always saw Mr. McClesky with the gun when he was in my house.

Q Okay. Let me give you what is part of your statement and ask you to look at these questions and answers and see if you gave them to the police. Would you do so, please?

A Here you go.

Q Is that your signature at the bottom of that page?

A Yes, it is.

Q Okay. What day did you give this statement to the police?

A The 5th and the 30th.

Q Okay. So you give it on May 30th, is that right?

A Yes.

Q Okay. Having read this, does that refesh your recollection now?

A I don't remember.

* * *

[632] Q Okay. The next question is, "Mrs. Jenkins, have you seen Ben Wright with any other guns? Answer. He took my gun, which is a .32 caliber blue steel revolver, and I also seen him with a .38 caliber silver in color with long barrel." Do you recall that question and answer?

A Yes.

Q Tell us about that. What circumstances and when did you see Mr. Wright with that silver colored gun?

A I saw it in my house and he had it in his pocket.

Q Who had it?

A Ben.

Q When did you see this?

A It was before May the 13th.

Q How much before May the 13th?

A About a week.

[633] Q Okay. When was the last time you saw the gun at your house?

A The last time I saw the gun at my house was before May the 13th.

Q Well, that is what I am saying. How much before May the 13th if you can pinpoint it, a day or a –

A About a week.

Q Okay. Now, the next question, "Have you ever seen Warren McClesky with a gun other than the shotgun he removed from your house on May the 13th, 1978? Answer: He totes a .45." Do you recall that?

A A .38. It looked like a .45 but it was a .38.

Q .38 what?

A Silver pistol.

Q Okay. I though you said you knew guns.

A That short, fat gun, it looked like a .45.

Q Well, what I am saying is – are you saying your answer here is incomplete then?

A Yes.

Q Okay. So you are saying there should have been more onto this than what you said?

A No.

Q Well, why didn't you tell the police that you had seen him with that silver gun before?

A Tell the police I seen –

[634] Q Mr. McClesky – why didn't you tell the police in the statement that you were giving them that you had seen Mr. McClesky with the silver gun?

A I did see Mr. McClesky with the silver gun.

Q They asked you that question?

A Yes.

Q And you said the only thing you had ever seen him with was a .45, didn't you?

A It was a .38. Another one was a .45 and a shotgun and a .22 caliber pistol, long-range.

Q Okay. Why didn't you tell them all that when they asked?

A I said I lied.

Q Oh, you were lying when you said Mr. McClesky only carried a .45?

A I said I lied to them at first. I saw McClesky with a long .38, plus I saw that big gun that looked like a .45.

Q Okay. Well, are you saying that you were lying when you told the police that the only thing he toted was a .45, that is what I am trying to understand?

A I though it was his gun, but it was Burney's gun.

Q How did you find that out?

A Well, between his sisters.

Q Well, at the time you gave the statement you said that this statement was true and correct, didn't you?

[635] A Yes.

Q Did you ever tell the police otherwise?

A No.

Q Before you talked to the prosecutor in this case you had never told the police that you saw Mr. McClesky with a silver gun, had you?

A I told the police I had seen him with one.

Q When?

A Before this had happened. I told him I seen him with it in a brown bag.

Q Okay. Why isn't that in any one of the three or four page statement you gave the police on the 30th?

A I don't know. It's supposed to be in there.

Q You did read the statement before you signed it, didn't you?

A Yes.

Q Okay. Has there been any mention of payment of a reward in this case to you for you testimony?

A Yes.

Q How much?

Q They said there was a thousand dollar reward.

MR. TURNER: No further questions.

* * *

[680] RECROSS-EXAMINATION

BY MR. TURNER:

Q Mr. Wright, how many crimes have you been convicted for all total?

A [BEN WRIGHT] I can't count them.

Q Why not?

A Well, because there's quite a few.

[681] Q So many you can't remember, right?

A Yes, sir.

Q You can't even remember how much time you have served altogether, can you?

A No, sir, I cannot.

Q It's been that much, hasn't it?

A Quite a bit.

Q Do you want to go back to jail now?

A I will have to. I am guilty of this crime, I have to go back to jail.

Q Going back to jail is better than facing the death penalty, isn't it?

A Well, naturally, yes, it is.

Q Now, you used the name James Edward Smith in connection with what?

A In connection with an escape I was on at the chain-gang, it was an alias. If I was apprehended by the law, it was a possibility I could get out before they knew who I was, and Ben Wright would have been a sure giveaway and I changed my name.

Q When you were arrested in Pine Bluff you did not have a silver gun?

A I think I did, a .38 gun.

Q What happened to it?

A I think the authorities now have the gun.

[682] Q Is that the only silver. 38 you have ever had?

A The only one?

Q Yes, sir.

A Yes, sir, that is the only one I ever owned. I have had a .38 silver one in my possession. Matter of fact, I have kept the same gun Warren McClesky killed the officer with. I have kept it for a week or two.

Q When did you give that gun to McClesky then?

A I gave that gun to McClesky on several occasions.

Q Such as?

A Like he have came up and got it a couple of times. He have came and got it on three or four different occasions, you know, and brought it back.

* * *

[830] Q [BY ASSISTANT DISTRICT ATTORNEY RUSSELL PARKER]: Specifically, Mr. McClesky, have you ever had a conversation when you were in that jail cell, one north fifteen, either with Mr. Dupree, who was over above you, or with the man who was in the cell next to you, stating that you shot the police officer?

A [BY WARREN McCLESKEY]: No, sir, I have not.

MR. TURNER [DEFENSE ATTORNEY]: Your Honor, before we go any further, could we approach the Bench for a minute, please?

THE COURT: Yes, sir.

(Whereupon, the following discussion was had between Court and counsel at the Bench, out of the hearing of the jury.)

MR. TURNER: Your Honor, I think that from the direction of things from what Mr. Parker is saying it appears that he must have some other statements from the defendant. I asked for all written and oral statements in my pre-trial motions. If he has something he hasn't furnished me, I would object to getting into it now.

THE COURT: Well, he has a statement that was furnished to the Court but it doesn't help your client.

MR. TURNER: I am not dealing with that part of it. I am saying I asked him –

[831] MR. PARKER: It's not exculpatory.

THE COURT: You are not even entitled to this one.

MR. TURNER: I am entitled to all statements he made. That is what the motion was filed about.

THE COURT: This is not a statement of the defendant.

MR. TURNER: We are not talking about a statement of the defendant.

THE COURT: I don't know that we are talking about any written statement.

MR. TURNER: I am saying I filed for oral and written statements. I asked for all statements of the defendant.

THE COURT: Let the record show I wrote you and made it of record. It is not admissible and what he is doing is in the Court's opinion proper.

MR. PARKER: I would like to place in the record at this time, if Mr. Turner doesn't mind, that I have furnished him complete copies of everything except what we are about to get into, plus some Grand Jury testimony, and he has had use of it during this trial.

MR. TURNER: I don't object or argue about that, I am simply saying –

MR. PARKER: I want the record to reflect that.

MR. TURNER: I am saying he didn't furnish me with everything, and that is one of the requirements of the law in terms of furnishing all statements that a defendant makes.

[832] THE COURT: Well, that will be a defense that you can use in the Appellate Courts if he has violated the law.

MR. TURNER: I would object at this time on that basis.

THE COURT: I will let the record show he has not violated the law, in my opinion.

MR. TURNER: I will let the record show he has furnished me everything, and for the first time here today at trial he may have some oral or written statement from

my client that he has never furnished me. I would object to any introduction or admission of those statements.

THE COURT: I will overrule the objection.

PETITION FOR WRIT OF HABEAS CORPUS
Superior Court, Butts Co. Ga. (H.C. No. 4909)

WARREN MCCLESKEY,
Petitioner,
v.
WALTER ZANT, Warden,
Georgia Diagonistic and
Classification Center,
Respondent.

H.C. No. 4909

I. INTRODUCTION

(1) This is a petition for a writ of habeas corpus to relieve the petitioner of restraint under a conviction and sentence of death imposed upon him by the State of Georgia in violation of his rights under the Constitution of the United States and of the State of Georgia.

* * *

IV. Respects in Which Petitioner's Rights Were Violated

* * *

(20) The State's failure to disclose its arrangement made with a police agent or informer, who testified at trial and who was not prosecuted for an outstanding escape charge because of his cooperation and testimony, violated petitioner's rights guaranteed by the due process clause of the Fourteenth Amendment, and Sections 2-101 of the 1976 Constitution of the State of Georgia.

(21) The deliberate withholding from petitioner of a statement by defendant, allegedly made to a government agent or informer while petitioner was incarcarated and awaiting trial, denied petitioner due process rights guaranteed by the due process clause of the Fourteenth Amendment to the United States Constitution and Section 2-101 of the 1976 Constitution of the State of Georgia.

* * *

Respectfully Submitted,

/s/ Robert H. Stroup

ROBERT H. STROUP
1515 Healey Building
57 Forsyth St. N.W.
Atlanta, Georgia 30303

JACK GREENBERG
JAMES M. NABRIT III
JOHN CHARLES BOGER
10 Columbus Circle
New York, New York 10019

ATTORNEYS FOR THE
PETITIONER

AMENDMENT TO PE ITION FOR WRIT
OF HABEAS CORPUS
Superior Court Of Butts Co. Ga. (H.C. No. 4909)

(Caption Omitted In Printing)

Comes now the petitioner, WARREN McCLESKEY, and files this Amendment to his Petition for Writ of Habeas Corpus. The following additional paragraphs are added to the petitioner's claims:

(35) The introduction into evidence of the petitioner's statements to an informer, elicited in a situation created to induce the petitioner to make incriminating statements without the assistance of counsel, violated the petitioner's right to counsel under the Sixth Amendment to the Constitution of the United States and Section 2-111 of the 1976 Constitution of the State of Georgia.

(36) Petitioner was convicted of the charges of murder and two counts of armed robbery without proof of his guilt beyond a reasonable doubt, in contravention of the due process clause of the Fourteenth Amendment and Section 2-101 of the 1976 Constitution of the State of Georgia.

Respectfully submitted,

/s/ Robert H. Stroup
ROBERT H. STROUP
1515 Healey Building
Atlanta, Georgia 30303
ATTORNEY FOR
PETITIONER

STATE HABEAS CORPUS TRANSCRIPT
WARREN McCLESKEY vs. WALTER ZANT
Superior Ct., Butts Co. Ga. (No. 4909)
January 30, 1981

(Caption Omitted In Printing)

[BY TRIAL DEFENSE ATTORNEY JOHN TURNER]: . . . In addition, I filed a motion asking for all oral and written statements within the possession and control of the Prosecutor. So I did not have any forewarning that Mr. Evans was going to testify to some statement that he allegedly overheard based on those circumstances.

C [BY ROBERT STROUP]: All right. Just so the record is clear, what – briefly what did Mr. Evans testify to at the trial?

THE COURT: Mr. Stroup, the record will indicate what he said. That is far more reliable than what he can remember.

MR. STROUP: All right. Your Honor, I basically was – rather than for the record which is in the record, I will give you a brief introduction about it.

THE COURT: Well, I think that the question should be why did they not give you a copy of the statement he made if you made a motion for it.

THE WITNESS: Well, I can't answer that question even up to this point in time. That was one of the issues that I raised on appeal, the fact that I was never given any indication that such a statement existed.

THE COURT: Do you mean that you talked to the Prosecutor six times and you two never discussed that at all?

THE WITNESS: We went over the motions, all of the motions and the only thing that he said to me about his file was that there were two things that weren't included in the file. One was the Grand Jury testimony of a witness and his logic there was that that was not discoverable. And the other was just a statement he had and that he didn't disclose what it was or who the person was in that context.

They clearly understood and they knew that the motion had been filed. So my thinking on the matter was that I had everything, particularly relating to the statements of the Defendant.

DEPOSITION OF RUSSELL PARKER
Superior Ct., Butts Co. Ga. (No. 4909)
February 16, 1981

(Caption Omitted In Printing)

[8] Q. [BY ROBERT STROUP]: Okay. Now, I want to direct your attention to a statement from Offie Evans that was introduced at Warren McCleskey's trial and ask you a few questions about that statement. How was it that you came to learn that Offie Eavns (sic) might have some testimony that you would want to lose in the Warren McCleskey trial?

A. [BY ASSISTANT DISTRICT ATTORNEY RUSSELL PARKER]: Okay. When you referred to a statement, Offie Evans gave his statement but it was not introduced at the trial. It was part of that matter that was made in camera inspection by the judge prior to trial.

Q. All right. Let me make clear what my question was, then. Offie Evans did in fact give testimony at the trial – let me rephrase it. When did you learn that Offie Evans had testimony that you might want to use at trial?

A. I believe I was first notified by Detective Jowers or Detective Harris, homicide detectives, who apparently had been contacted by a deputy, C. K. Hamilton. I don't recall at this point whether Jowers and Harris went out to the jail to talk to Offie and that involved me or whether they called me [9] over to the Atlanta Police Department and we talked to Evans there. I know I did talk to Evans and I did talk to him at the Atlanta Police Department.

Q. How about Detective Dorsey? Do you recall Detective Dorsey being involved at all?

A. Dorsey was involved in the investigation. At what point, I don't remember.

Q. All right. How about specifically with respect to testimony of Offie Evans? Do you recall Dorsey having any role in developing the testimony of Evans?

A At this point I don't know if Dorsey had any role in it. The only thing I remember really is that Deputy Hamilton, Detective Jowers and Harris.

Q. Did you, yourself, have any prior dealings with Offie Evans prior to his becoming involved in the Frank Schlatt case?

A. No, sir, I didn't know Offie Evans prior to that time.

Q. Okay. Were you aware at the time of the trial of any understandings between Evans and any Atlanta police department detectives regarding favorable recommendation to be made on his federal escape charge if he would cooperate with this matter?

A. No, sir.

Q. Let me ask the question another way to make sure we are clear. Are you today aware of any understanding between [10] any Atlanta police department detectives and Offie Evans?

A. No, sir, I'm not aware of any. I understood that he was not prosecuted for the escape but I understand he was placed back in the federal penitentiary.

Q. Okay. Did you, yourself, after the Warren McCleskey trial, contact any FBI agents to discuss with them the matter of a pending escape charge?

A. I have talked to several FBI agents about the case. Only one time did it involve Offie Evans. And that was after all the trials were completed. And I believe it was in regards to segregating him in some way out at the federal pen for his own protection.

* * *

[14] REDIRECT EXAMINATION

BY MR. DUMICH [Assistant Attorney General]:

Q. I just have a few questions. Mr. Parker, in regards to Offie Evans's testimony at trial, Mr. McCleskey's trial, was there any deal whatsoever made with Mr. Evans in exchange for his testimony at the trial?

A. [BY RUSSELL PARKER]: I'm not aware of any. I don't know of any deal.

Q. What about at the Burney trial? Was there anything, was there any indication given by you to Mr. Evans prior to his testimony in the Burney trial that you would do anything for him or try to do, try to contact people for him to try and see that his escape charge wasn't prosecuted or that he would get a reduction in sentence or anything along those lines?

A. I have never asked anybody to drop a charge. I don't know of Offie ever asking anybody to try and get the charges dropped for him. I am not surprised that they are dropped. Obviously the police officer was killed and the guy testified twice for the state. It doesn't surprise me in the least that the charges have been dropped. But the fact that the charge was dropped doesn't mean that he wasn't punished because he was put back in the federal pen.

Q. Do you have any knowledge that Mr. Evans was working [15] as an informant for the Atlanta Police or any police authorities when he was placed in the Fulton County Jail and when he overheard these coversations (sic) of Mr. McCleskey?

A. I don't know of any instance that Offie Evans had worked for the Atlanta Police Department as an informant prior to his overhearing conversations at the Fulton County Jail.

LETTER, State Habeas Corpus Proceedings
Superior Court, Butts Co. Ga.

THE DEPARTMENT OF LAW
STATE OF GEORGIA
ATLANTA
30334

February 17, 1981

Mr. Foster Corbin
Certified Court Reporter
1293 Peachtree Street, N. E.
Suite 828
Atlanta, Georgia 30309

Re: *Warren McClesky v. Zant*, habeas corpus – deposition of Russell Parker.

Dear Foster:

Enclosed is a complete copy of the prosecutor's file resulting from the criminal prosecution of Warren McClesky in Fulton County. As agreed by counsel for both parties who attended the deposition of Mr. Russell Parker on February 16, 1981, the enclosed file (including cover sheet) is to be attached to Mr. Parker's deposition as Joint Exhibit A and forwarded along with the deposition to the Superior Court of Butts County.

If you have any questions concerning the aforesaid, please contact me at 656-3499.

Sincerely,

/s/ Nicholas G. Dumich
NICHOLAS G. DUMICH
Assistant Attorney General

NGD/cab

cc: Mr. Robert Stroup
Attorney at Law
1515 Healey Building
Atlanta, Georgia 30303

FEDERAL HABEAS CORPUS HEARING
(U.S. District Court, N.D.Ga.) (No. C-87-1517-A)
PETITIONER'S EXHIBIT #2

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

WARREN McCLESKEY,	:	
Petitioner,	:	CIVIL ACTION
vs.	:	NO. ___
RALPH KEMP,	:	
Respondent.	:	

AFFIDAVIT OF ROBERT H. STROUP

STATE OF GEORGIA)
)
COUNTY OF FULTON)

Personally before the undersigned officer duly authorized by law to administer oaths appeared ROBERT H. STROUP, who, after being duly sworn, deposes and states as follows:

1. My name is ROBERT H. STROUP. I am more than eighteen years of age, and am under no legal disability of any kind. This affidavit is given freely and voluntarily, without coercion of any kind. I understand it will be used in court proceedings on behalf of Warren McCleskey.

2. I was initially retained to represent Warren McCleskey in April, 1980. At that time, a petition for writ of certiorari to the Georgia Supreme Court was due to be filed in the United States Supreme Court within days of

my retention, and my first act was to obtain an extension of time for the filing of that cert petition.

3. I filed a petition for certiorari in the United States Supreme Court in June, 1980. One of the issues I raised on McCleskey's behalf was a Brady claim – that the State had wrongfully withheld McCleskey's oral statement to Evans. In preparation for bringing this claim I reviewed the Georgia Supreme Court decision as well as the trial transcript. I did not understand that there was a written statement from Offie Evans. Like the Georgia Supreme Court, I understood that there was an oral statement, and that it had been introduced in its entirety through Evans's testimony at trial.

4. The next major development related to the case was the denial of cert by the United States Supreme Court in October, 1980, and the setting of a new execution date. On December 19, 1980, McCleskey appeared in Fulton Superior Court and his execution was scheduled for January 8, 1981.

5. In December, 1980 and January, 1981, I did extensive research and investigation relative to the habeas corpus petition that was filed on McCleskey's behalf in Butts Superior Court on January 5, 1981. More than 20 substantive claims were raised in the petition; several of them required investigation outside of the trial transcript. In January, 1981, I interviewed, in person or by phone, more than 30 persons relative to these claims.

Among the facts which I sought to develop were the facts surrounding Evans's involvement as a witness at McCleskey's trial. At no time during the state habeas process did I learn of the existence of a written statement

given by Offie Evans prior to McCleskey's trial. I would surely have requested that information had it come to my attention, given my effort to develop the details of Evans's relationship with County and City personnel.

6. During the course of the federal habeas hearing, I sought further discovery of federal officials regarding the circumstances surrounding Evans's escape from the federal halfway house. Again, at no time did it come to my attention that Evans had given a written statement to Atlanta police and the Fulton County District Attorney's office in August, 1978.

7. After the October, 1986 argument of McCleskey's case in the United States Supreme Court, Jack Boger and I continued to examine possible constitutional claims that might be raised on Mr. McCleskey's behalf. One issue to which our dicussions (sic) returned was the understanding between Offie Gene Evans and Atlanta police detective Sidney Dorsey, under which Evans expected that Dorsey would "speak a word" with federal authorities about his pending federal escape charges in exchange for his testimony against McCleskey. A majority of the Court of Appeals had denied relief on this claim, finding that the understanding between Evans and Dorsey was too "marginal" or insubstantial to have constituted a "promise" under *Giglio v. United States*, and that revelation of the understanding to McCleskey's jury would have been "unlikely [to] . . . have affected the jury's assessment of Evans's credibility."

8. We were both troubled, however, by the factual premises of these legal conclusions and we decided that it could prove useful to speak with Offie Evans to clarify

the understanding he had worked out in 1978 with Detective Dorsey. We also agreed to contact McCleskey's jurors, to determine firsthand whether revelation of Evans's agreement with Dorsey may have made a difference in their verdicts.

9. We began in late March of 1987 what proved to be a long, expensive and fruitless effort to make direct contact with Offie Evans. Working through the Department of Corrections, I determined that Evans was back in the state penal system, serving a sentence in the Ware Correctional Institution in Waycross, Georgia. I spoke with Ware Correctional officials and determined that we could visit Mr. Evans with his agreement. My co-counsel, Jack Boger then wrote to Evans, asking permission to speak with him. When our letter went unanswered, I spoke again with Ware officials and learned that an inmate counsellor was available to convey our request to Evans directly. I spoke with his counsellor, but was again unable to schedule a meeting.

10. We then learned that Evans was scheduled for release and was expected to return to Atlanta on May 10, 1987. I contact (sic) his sister and requested that she let me know when Evans arrived in Atlanta. She agreed to do so. Yet during the week of May 11-15th, I was unable, despite frequent attempts, to make direct contact with Evans. Thinking that perhaps a black, rather than white, attorney might be able to establish some greater amount of trust with Evans and his family, I asked a young black attorney, Bryan Stephenson, to attempt to make contact with Evans. For several weeks Stephenson tried to talk with Evans, making frequent visits to several of Evans's

relatives at different hours of the day and night. His efforts were also unsuccessful.

11. Finally, sensing that time was growing short, Jack Boger and I decided to hire Delaney Bell, a highly-recommended private investigator, to locate Offie Gene Evans. Although Mr. Bell (i) checked probation sources – who informed him that Evans had not shown up for required probation meetings; (ii) talked with numerous family and community sources; (iii) checked Atlanta Police Bureau sources and (iv) "staked out" the locations where Mr. Evans was said to sleep, he was unable to locate Evans.

12. As indicated earlier, our purpose in seeking Offie Gene Evans was to learn more about the understanding he had reached in 1978 with State officials, to strengthen the factual basis for the Giglio claim. During one telephone conversation with Jack Boger in late May, 1987, we explored other possible sources of information. I mentioned to him, in passing, the recent success of a number of Georgia broadcasters in obtaining police investigative files in the Wayne Williams case.

13. Although I was not otherwise familiar with the Georgia Open Records Act, and although I had never heard of its being used successfully to obtain records in an on-going criminal or habeas proceeding, I agreed that we might use the apparent victory of the broadcasters in *Napper v. Georgia Television Co.*, No. 44381 (Georgia Supreme Court) to request access to the police investigative file in the Frank Schlatt/Dixie Furniture Store case.

14. Late Friday afternoon, May 29, 1987, I contacted Mr. Roy Mays, an Assistant City Attorney with whom I

had had prior contacts, who suggested that I make a formal written request to the Atlanta Bureau of Police Services. He indicated, however, that it was unlikely that any documents would be produced until the Georgia Supreme Court acted on the City's petition for rehearing. I was advised by Mr. Mays that the City had specifically requested in its rehearing position that the Supreme Court reconsider its newly-announced rule that criminal investigation would be deemed "closed" under the Open Records Act even if a habeas corpus proceeding was pending. On Monday, June 1, I hand-delivered a letter to the Chief of Police, requesting "the opportunity to inspect and copy all records in the possession and/or control of the Atlanta Bureau . . . related to the investigation into the slaying of Officer Frank Schlatt in May, 1978." (See Federal Petition, Exhibit Q).

15. On June 4, I was contacted by Deborah Floyd, an Associate City Attorney, who informed me that the Georgia Supreme Court's decision on June 3, modifying its earlier *Napper* opinion, would have some bearing on whether any or all documents would be released. She indicated that preliminarily she had flagged approximately 97 documents as subject to potential privacy concerns under the modified decision of June 3. At her request, I agreed to a short extension of time.

16. On June 10, I telephoned Roy Mays and Deborah Floyd and stressed the urgency of my request. When asked to specify documents I was interested in, I replied that my first priority was any documents relating to Offie Gene Evans. Deborah Floyd happened to recall one such document in the file, and the City agreed to

furnish that one document while awaiting further clarification from the Supreme Court in the *Napper* litigation. (By that time, the Georgia broadcasters had filed their own petition for rehearing). At the time the City agreed to make this "memo" available, I had no idea what the document was, or what information it contained. It was in this manner that I came into possession of the August 1, 1978 statement of Offie Gene Evans.

17. Since filing the First Amendment to the state habeas petition, the State has pointed to a number of references in the transcript which, the State contends, should have made the existence of this written statement obvious to me. Its existence was not obvious to me, prior to June 10, 1987, when I received a copy from the City Attorney's office. Prior to that time, I simply did not understand that there was a written statement from Evans.

18. In preparing for both the initial cert petition in June, 1980, and the initial state habeas petition in January, 1981, I had reviewed the 1037-page transcript of trial. I had also reviewed the Georgia Supreme Court's decision on direct appeal. I was left with the distinct impression that there was nothing in writing related to Offie Gene Evans that the State was withholding. This impression was based, I believe, on the trial court's own reference – when John Turner was seeking production of additional documents – that "I don't know that we are talking about any written statement." (Tr., 831). Further, the Georgia Supreme Court, on direct appeal, upheld the denial of access to Evans's oral statement without a hint that any written pre-trial statement by Evans existed. The Supreme Court explicitly stated that "the evidence

[defense counsel] sought to inspect was introduced to the jury in its entirety." This was in obvious reference to the actual oral testimony of Evans at trial, further reinforcing my impression that there was nothing written that the State had not produced.

19. The State has also argued that the trial court's order of September 27, 1978 should have served notice on me that there was a written statement. However, that order makes no reference to the witness Offie Gene Evans (or any other witness) and I have no recollection of connecting that September, 1978 order with any witness statements. My own recollection is that my investigation indicated that the order related to a test of hair samples that were taken from each of the co-defendants. I certainly did not connect that order to Offie Gene Evans.

20. The State also contends that a passing comment from the Russell Parker, the Assistant District Attorney who tried the case, made during his deposition taken in the first state habeas hearing, should have been notice to me of the existence of a written statement from Evans. Parker's comment, at page 8 of the deposition, however, was not directly responsive to my question, and I thought he misunderstood my question. I do not believe I actually understood what he said in response to my question, and I rephrased the question to make certain that he understood me. When the deposition transcript became available to me for review, I already had Nick Dumich's letter reflecting his understanding that what we were dealing with was a complete copy of the prosecutor's file. It never occurred to me at this state in the proceedings that there was a written statement from Offie Evans that the State had not produced.

This 8th day of July, 1987.

/s/ Robert H. Stroup
ROBERT H. STROUP

Sworn to and subscribed before me,
this 8th day of July, 1987.

/s/ Alice M. Lewis
Notary Public

Notary Public Georgia State at Large
My Commission Expires June 25, 1988

FEDERAL HABEAS CORPUS TRANSCRIPT

(U.S. District Court, N.D.Ga.)
(No. C-87-1517-A)

July 8, 1987

(Caption Omitted In Printing)

* * *

[28] Robert H. Stroup, called as a witness on behalf of the petitioner, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. BOGER:

Q. Mr. Stroup, are you presently one of the counsel for Warren McCleskey, the petitioner in this matter?

A. I am.

Q. When did you first become counsel in this case?

A. April of 1980.

Q. Under what circumstances?

A. I was contacted by Patsy Morris of the ACLU asking me if I would agree to represent Warren McCleskey on his post-conviction proceedings.

Q. At that point, what were the stage – what was the stage [29] of his proceedings?

A. The Georgia Supreme Court decision on direct appeal had been issued in, I believe, January of 1980, and there was a cert. petition that needed to be filed to the U.S. Supreme Court.

Q. Did you prepare that petition?

A. Yes, I did.

Q. What kinds of claims did you investigate at that time with respect to the certiorari petition?

A. My recollection is that the the [sic] claims were based on claims that were raised on direct appeal by John Turner.

Q. Do you recall why you so limited yourself?

A. Well, it was my understanding that I was restricted to the issues that had been raised on direct appeal.

Q. Restricted in what forum?

A. In the – in the Supreme Court, in the United States Supreme Court, that the cert. issues needed to be issues that had been raised on direct appeal to the Georgia Supreme Court.

Q. Did you, in fact, ultimately file that petition?

A. Yes, I did.

Q. Was it granted or denied?

A. It was denied in October of '80.

Q. Did you at some point thereafter begin to prepare any further documents or pleadings for Mr. McCleskey?

A. Right. Actually, some amount of investigation had gone [30] on while the cert. petition was pending.

Q. Toward what end? What –

A. Anticipating a – a habeas corpus proceeding in state court.

Q. And what was the scope of your investigation, generally speaking, in preparation for that state habeas corpus filing?

A. Well, I spoke with – just generally speaking what did I do to get –

Q. Yes, let's talk generally and then focus more specifically on the possible Massiah or Henry claims.

A. Well, I spoke with the client several times. I read the transcript. I am certain I read the transcript of the trial prior to filing the – the cert. petition in the United States Supreme Court. I am certain that I reread that transcript again at some time prior to the filing of the state habeas petition. I sort of, as I read, I was trying to identify issues, both issues that had been raised or suggested on directed appeal as well as new issues that had not been raised and –

Q. Ultimately, for the record, how many issues did you present to the state hey (sic) habeas corpus court?

A. In excess of 20. The precise number I can't say, 22 maybe. I think it depends, in part, on how you count the paragraphs and whether a particular paragraph counts as a separate issue or is encompassed in a prior paragraph.

[31] Q. But over 20. The District Court has noted that Mr. Evans, one of the witnesses at trial against your client, Warren McCleskey, had been a cellmate at some point prior to the trial and had ultimately given testimony against Mr. McCleskey. At any point did it occur to you that there might be a so-called Massiah or Henry claim to be raised?

A. Yes, it did, and it occurred during this investigation for the state habeas hearing. It was suggested to me just on the sort of the bear (sic) facts that we had, which were not many, that is, that he was – that Evans was assigned to the cell immediately adjacent to Warren McCleskey. I wondered about the circumstances of that, particularly as it related – particularly because McCleskey was in solitary.

Q. Let me ask you, Mr. Stroup, did you take your suspicion a step further and contact anyone to find out information about a possible relationship?

A. Yes, I – I interviewed a number of – I spoke with a couple of Atlanta Bureau of Police Services Officers, the people who I knew just from my prior litigation, the Atlanta Bureau of Police Services, for the purpose of getting background information on how I might go about reasonably developing factual evidence in support of a claim.

Q. Let me just make the record clear. You mentioned prior litigation with the Atlanta Bureau of Police Services. That was unrelated to this case?

[32] A. Yes. I had been for a number of years counsel in a title seven proceeding that involved the Atlanta Bureau of Police Services.

Q. All right. Did you at any point speak with any particular officers of the Atlanta Bureau of Police Services about the relationship between Offie Evans and their department?

A. I think my conversations with the Atlanta Bureau of Police Services personnel was, basically, along

the lines of – my recollection at this point is that my conversations were along the lines of, if Evans is an informer, how would I – well, no. First of all, given the practices of the Bureau, is there reason to think that Evans could be a – an informer planted there in the cell, and if so, how would I go about developing factual support for that.

Q. And did you receive any answers to those questions?

A. Right, I – I, in fact, was told that – that it would not be surprising for that to have occurred, and the suggestion was I needed to speak with a number of people at the – who were deputies at the Fulton County Jail regarding what information they would have.

Q. Now, these are deputy sheriffs serving under the sheriff who are at the jail?

A. That was my understanding.

Q. Did you speak with such jailers?

[33] A. I know that I spoke with two people who were specifically identified to me as people who might have information, and I had a third name. I am unable to state at this point whether I ever was able to make contact with him. I know I made efforts to contact him but whether – I can't say at this time whether I actually spoke with him or not.

Q. So you spoke with at least two. Did either one of you get – did either one of them give you information respecting Mr. Evans' status as an informant?

A. No, they – none of them had any information. Basically, they had no recollection of the circumstances regarding how Evans came to be assigned to the jail cell that he was assigned to or of any conversations with the Atlanta Bureau of Police Services Detectives regarding Offie Evans' assignment to that jail cell.

Q. Now, there's been some representations this morning that at some point a deposition of Russel Parker, the assignment district attorney in this case, was taken. Did you take that deposition?

A. Yes, I did.

Q. Do you recall when it was?

A. It was – my recollection is that it was mid February of '81. It was after the hearing that he had in Butts Superior Court on the first State Habeas Hearing, which I recall was late January, maybe January 30th.

[34] Q. Was the record – forgive me. Was the record still open for inclusion of this deposition in the State Habeas proceeding?

A. Yes. Yes.

Q. During –

A. Mr. Parker was not available to come to the hearing itself, and the record had been held open for his deposition.

Q. During that deposition, did you question Mr. Parker about whether there had been an informant relationship between Mr. Evans and the Atlanta Bureau of Police Services or the prosecutor's office?

A. Yes, I did.

Q. Do you recall his answers?

A. I – I asked I don't recall the specific question, but there is a question in there about police informer.

Q. If you don't recall, let me ask you, if I might, if I can approach the bench, if I can show counsel, my witness, a copy of the document. Can you identify that document?

A. Yes. It's a copy of the deposition of Russell Parker that was taken as part of the proceedings for the first state habeas.

Q. Does that refresh your recollection about when it was taken?

A. Right, it says February 16th.

Q. 1981? Let me direct your attention to the bottom of [35] page 14 of that deposition.

A. Yes, I asked –

Q. No, who is questioning at this point?

A. The – it's – actually, it seems to be examination by Nick Dumich.

Q. And who is Nick Dumich?

A. He's the assistant attorney general who was representing the state in this proceeding.

Q. Do you recall the question and the answer now that you have reviewed these documents?

A. Well, it indicates that Nick asked Russ Parker, do you have any knowledge that Mr. Evans was working as

an informant for the Atlanta police or any police authorities when he was placed in the Fulton County Jail and when he overheard these conversations of Mr. McCleskey?

Q. And what was the –

A. And the answer was, I don't know of any instance that Offie Evans had worked for the Atlanta police department as an informant prior to his overhearing conversations at the Fulton County Jail.

Q. Did you have any reason to doubt Mr. Parker's testimony at that point?

A. No.

Q. You indicated that you had – you were suspicious and you made some prehearing attempts to develop evidence. At any [36] point, did you file a claim based on Massiah?

A. Right. Well – Yeah, I wish I had looked at the pleadings more recently, but my recollection is that I amended the state habeas petition to specifically include a paragraph where I viewed myself as raising a Henry Claim, a U.S. versus Henry Claim, quite specifically.

Q. At that point, did you have substantive evidence acquired from your suspicions to support it?

A. Right. At the time all I had was the – the bare bones kind of evidence that I had. My recollection is I – I filed the petition and then realized that I still might very well be able to develop something in support of it and that I should include it and, therefore, amend it to add that paragraph.

Q. During – during the state habeas proceeding, did you make any inquiries with respect to Offie Evans on this issue?

A. I did try to develop on my examination with Offie Evans the – the matter of the circumstances for his being placed in solitary confinement and specific questions about who the arresting officer who his arresting officer was, in an effort to then further develop the circumstances surrounding his arrest and placement in solitary.

Q. Were those efforts successful? Did any evidence come out?

A. No, he had no recollection of who the arresting officer was, and he had no notion as to the reasons for his being [37] placed in solitary confinement. At least that's what his testimony was.

THE COURT: Was this on deposition or at the hearing?

THE WITNESS: No, no, that is at the State habeas hearing.

BY MR. BOGER:

Q. Had you made attempts prior to the state hearing to speak to Mr. Evans?

A. Actually, Yes, I had. Mr. Evans, we had – I had substantial problems identifying – locating Offie Evans prior to the State habeas hearing, and I spent much more time than I would have liked in the – in that time period, that month or month and a half time period prior to trial,

trying to locate him. It turned out, actually, that he was in the – in Jackson, and –

Q. By that you mean the Georgia Diagnostic Center?

A. Right.

Q. Let me – let me –

A. But on some peculiar circumstance such that he wasn't showing up on the State system, and when we – or when we – when we made inquiry – and I'm sorry, I really have forgotten the details, but even though we were making inquiries, we weren't asking the right question or somehow at any rate we kept – you know, we – they.

Q. Your efforts were unsuccessful?

[38] A. Right.

Q. Let me just summarize your testimony and ask you one –

A. No, no, I should say – no, no, I did then locate him like very close to the date of the hearing, six, seven days, I don't know, prior to th hearing, actually long enough in advance that we were able to get a writ issued by the Butts Superior Court for him to be brought to the state habeas hearing but not – just – there really wasn't enough time, given the press of my – the ordering of my priorities to get in and interview him prior to the hearing.

Q. So you attempted during the hearing to speak to him. You indicated that in a deposition Mr. Parker had indicated he knew of no such relationship. You had spoken with Atlanta Police Bureau officials who pointed you toward Fulton County.

MS. WESTMORELAND: Your Honor, I'll object to Mr. Boger summarizing the testimony of counsel, his own witness can testify for himself.

THE COURT: Sustain the objection.

BY MR. BOGER:

Q. Mr. – Mr. Stroup let me ask you one additional question on this line. During the hearing, did you attempt any other efforts to substantiate even inferentially an informant relationship between Mr. Evans and the State?

A. Well, I – excuse me. I though in – and the deposition record will really speak for itself. I'd have to [39] look at it. I thought I had some examination of Russell Parker directly as opposed to Nick Dumich's questions along the lines of what his – his own relationship was with Offie Evans prior to July of 1978.

MR. BOGER: Your Honor, we can do this one of two ways. I can either refresh his recollection through various pages, or we can submit the document, which the state is well aware of and has made reference to. It appears to me it might speed things if we simply submit the document because I think what it will reflect is some questions of that sort, but I'd offer it into evidence.

THE COURT: I think we need it in the record but while you've got him on the stand. Ms. Westmoreland?

MS. WESTMORELAND: Your Honor, I was just going to comment, as we noted previously, I believe this was submitted as respondent's exhibit number six in the first federal habeas proceeding, if it would simplify things to have an additional copy presented in the record

of this case, we have absolutely no objection and certainly, agree to having that submitted.

THE COURT: Well, at some point put it in as your 3, but right now while you've got him so he can talk about what he sees, refresh his recollection and ask him to –

BY MR. BOGER:

Q. Let me direct your attention to pages nine and following of the deposition, Mr. Stroup. If you could review those pages [40] and then having reviewed them use your recollection to testify further. Actually, perhaps I misdirected you. If you could begin at page eight.

A. Well, yes, in response to your question. I did ask Russell Parker during his deposition specifically as to his own involvement with Offie Evans, whether he had any prior dealings with Evans prior to his – what I meant was Evans' becoming involved in the Frank Schlatt case, and he indicated that, no, he didn't know Evans prior to that time, and there was also some examination regarding what, if anything, Parker knew regarding Atlanta police detectives and their contacts with Offie Evans.

Q. Let me – let me ask you further now, during the state habeas proceeding itself, did you question Mr. Evans about any other relationships he may have entered into with respect to the state?

A. Yes. Actually, the other piece of information that we had on an informer kind of relationship involving Offie Evans was a situation that occurred after McCleskey's trial, in which Evans appeared at a trial in Fulton County with Russ Parker as the District Attorney.

Q. That's the same Russell Parker as the District Attorney in Mr. McCleskey's case?

A. Right, in which Offie Evans' testimony basically was that while in Fulton County jail he received a jailhouse [41] confession from the defendant.

Q. By the defendant, you mean the defendant in the other case?

A. The defendant in that case.

Q. What did you proffer that for?

A. Well, we – that's the only other bit of information that we've been able to develop, and we did offer that evidence at the state habeas hearing for whatever inferential value it had of – as to Evans' relationship, recognizing that it was a relationship after the McCleskey trial, but, nonetheless, it was what we had of a concrete nature and we did present that evidence through cross-examination of Offie Evans at the state habeas hearing.

Q. Did the state – the state habeas court admit that evidence?

A. I don't recall at this point.

Q. Let me, if I might, approach the witness, give you a document, and see if it will help you refresh your recollection.

MS. WESTMORELAND: Once again for the court's reference, I believe the state habeas transcript is in the first federal proceedings as respondent's Exhibit No. 5.

THE COURT: All right.

BY MR. BOGER:

Q. Do you recognize this document, Mr. Stroup?

[42] A. Yes. This is a copy of the transcript from the state habeas, the first state habeas proceeding in Warren McCleskey's behalf, and you've directed me to page 123, which is where I begin to examine Offie Evans. I asked him, "Other than the McCleskey trial, have you ever yourself testified that someone had confessed to murder to you?" and it was my effort then to go in and develop that.

Q. Was there any impediment to that effort?

A. There was an objection raised.

Q. By whom?

A. The state.

Q. On grounds of what?

A. On the grounds of relevancy, and I indicated that we'd raised the Sixth Amendment claim based on the recent Supreme Court case, United States versus – the court reporter identifies it as United States versus Tanner, which may be my – her reading of my accent, I suppose, relating to the use of informers and a paid informer, and I went on to say that the line of questioning is simply to develop a pattern in this case that amounts to a paid informer being assigned to the Fulton County jail in a situation where he can, in one fashion or another, elicit incriminating evidence from persons within the custody of the Fulton officials.

And Mr. Dumich indicated that there was no testimony that he was a paid informer at all. I again argued

that we [43] were trying to show a pattern. There's a further objection on relevancy by Nick Dumich, and then the court inquired as to whether he had ever testified in a case before you testified in McCleskey's case about something somebody had told you in prison and –

Q. By "he" you mean Evans at this point?

A. Right. And Offie Evans indicated, "no." And, actually, then there is further – a further exchange between the Court and myself, and then at 126 I do resume questioning regarding his subsequent testimony at the trial of another defendant with Russ Parker as the District Attorney handling the case.

THE COURT: So you were allowed to inquire?

BY MR. BOGER:

Q. Apart from that substantive active evidence –

THE COURT: That's a question. You were then allowed to

THE WITNESS; Yes, it appears that I was.

THE COURT: All right.

BY MR. BOGER:

Q. Apart from that substantive evidence of subsequent testimony by Mr. Evans, were you able to develop any other evidence in support of a Henry, Massiah claim?

A. None that I can recall.

Q. Were you aware of any written statement by –

THE COURT: Let me stop you there.

Q. – Offie Evans?

[44] THE COURT: Let's take a morning recess now, be in recess about 15 minutes.

* * *

(Whereupon, a brief recess was had.)

THE COURT: During the recess, I flipped through the federal – my decision in the 1st habeas, and I don't see a Massiah issue raised.

MR. BOGER: I was going to –

THE COURT: Does the petitioner contend that it was raised?

MR. BOGER: No, Your Honor, I was going to get to that next.

THE COURT: Okay.

Q. Mr. Stroup let me pursue that line of questioning now. You indicated that you had filed an amendment to the state habeas petition raising a Massiah Henry type of claim. Did you advance that claim subsequent to the federal or to the state habeas corpus hearing?

A. The claim was not carried over into the federal habeas petition.

Q. Why not?

A. I think that I looked at what we had been able to develop in support of the claim factually in the state habeas proceeding and made the judgment that we didn't have the facts to support the claim and, therefore, did not bring it into [45] federal court.

Q. Did you carry over any related claims such as the Giglio versus United States claim?

A. We did think that we had a very good claim involving Offie Evans.

THE COURT: Giglio claim?

THE WITNESS: Right.

BY MR. BOGER:

Q. Mr. Stroup, let me ask you a few additional questions. At the time of the state habeas corpus proceeding, did you have any knowledge of any written statement that had been made by Offie Evans?

A. No.

Q. Did you have any knowledge at the time of the federal hearing of any such statement?

A. No.

Q. When was the first time that you are aware that there was a written statement by Offie Evans given to the police?

A. The first time I knew about it was about 4:30 in the afternoon on July 10th – June 10th of 1987, and I opened up an envelope that I had picked up from the City Attorney's office as I was going down the elevator to sort of read what it was I had picked up. I was taking the elevator down, and I opened it up and saw that 21 page statement from Offie Evans.

Q. One final question, at the time of the state habeas [46] corpus hearing, who was actively involved in the

investigation and the presentation of evidence at the hearing and at the deposition in concert with you?

A. At the state – at the state habeas hearing?

Q. That's correct.

A. Excuse me. Basically, I did the – I had the major responsibility of – for the first state habeas hearing on Warren McCleskey's behalf. I drafted the petition. I or people in my office did the investigation. You and, excuse me, other lawyers from the Fund were on the pleadings but I did – I know I sent you copies of the pleadings of – I'm not certain at this point that you had involvement through the first state habeas hearing beyond your receipt of the pleadings. I may have on occasion called you with a question, just generally as to a legal issue. I don't have any recollection of that, any specific recollection even of that during the first habeas, but I would not be surprised that I would have done that but basically – I mean, I was the only one – I was the one who conducted the hearing on behalf of McCleskey, I was the one in charge of the investigation, the interviewing of witnesses, the preparation of documents both at the Butts Superior Court level as well as the Georgia Supreme Court level.

MR. BOGER: Your Honor, at this time I don't have any additional questions of Mr. Stroup. I'd like to offer into evidence – the state has indicated it's been in previous [47] submissions in the first habeas, but for the convenience of the Court – the deposition of Russell Parker that's been referred to. That would be petitioner's 3, I believe.

THE COURT: It will be admitted.

MR. BOGER: Thank you.

THE COURT: Anything further of this witness?

MR. BOGER: No, Your Honor.

THE COURT: You may cross.

BY MS. WESTMORELAND:

Q. Mr. Stroup, I believe your testimony was that you talked to some – some members of the Atlanta Bureau of Police Services prior to the first state habeas corpus proceeding; is that correct?

A. Yes.

Q. And you do not recall who those individuals were at this time; is that also correct?

A. No, no, I – I can tell you of two specific persons who I spoke with, whether –

Q. Who did –

A. Whether that's the the complete list or not, I can't tell you.

Q. Who did you speak with?

A. One of the people I spoke with was – he's now Captain Eulis Moore. He at the time may have been a Sergeant. I'm not sure of the timing on his promotion to Captain. And the other [48] Atlanta Police Officer who I know specifically I spoke with was Detective Gresham.

Q. Did you at any time talk with Detective Harris prior to the first state habeas proceeding?

A. No.

Q. Did you talk to Detective Dorsey at any time prior to the first state habeas proceeding?

A. No.

Q. What about investigator. I believe he was, Eskew?

A. No, I did not.

Q. Did you ever talk to Deputy Hamilton?

A. I don't believe so. I don't – I talked with some people also at Fulton County jail. I don't have a specific recollection of Hamilton. It is possible that I spoke with Hamilton.

Q. Did you talk with anyone then who was actually involved in – directly involved with Offie Evans, eliciting his –

A. Yes, that was my understanding, that I was speaking to people at Fulton County jail who were directly involved with Offie Gene Evans. The – I know – I know of two people who I specifically spoke with and a third person who – who was represented to me as possibly having some information. The people who I spoke with, there was a gentleman named Bobby Edwards who by that time had left the Fulton County Sheriff's Department, if I've got the department right. I understood he [49] was at the jail and that he had information or was in a position to have information related to the questions I was asking, the underlying circumstances of Evans' assignment to solitary. He had by that time moved to Helen, Georgia or thereabouts. I – and I think it was – he was – it was represented to me that he was in real estate.

And I was able to find him through a realtor who I know up in that area, and I spoke with him, and he told me he had simply no recollection whatsoever of any of the circumstances.

Q. Once Offie Evans mentioned specifically the name of Dorsey, Detective Dorsey, in his testimony at the state habeas corpus proceeding, did you talk to Detective Dorsey to ascertain if he had any information that might be useful?

A. No, I did not.

Q. And, I believe, during the deposition of Mr. Parker, he mentioned the names of Detective Jowers and Detective Harris. Did you talk to them after that deposition to ascertain if they had any information?

A. At that – no, I did not. At that point in time in the procedure, you know, the – my understanding was the record was closed. I mean, we – we had concluded the evidence in the state habeas hearing. It was left open specifically for Parker and Kelly Fight's depositions, and we were on a briefing schedule.

Q. You did not make any attempt, though, to contact [50] witnesses whose names had been mentioned both by Mr. Evans and by Mr. Parker as having had contact with Mr. Evans?

A. I have – no, I do not believe that I did.

Q. So all you knew was that Mr. Parker had no knowledge of whether these detectives had had any prior contact with Mr. Evans, you did not know whether these detectives themselves had any prior contact with Mr. Evans; is that correct?

A. I believe that's correct, I – let me think. What I had was their testimony at trial, that, you know, these police officer's testimony at trial and Parker's deposition testimony.

THE COURT: Did they testify regarding this subject at trial?

THE WITNESS: I frankly can't say at this point.

MS. WESTMORELAND: Your Honor, I don't recall that they did. I believe the only one who did was chief – was the jailer, Mr. Hamilton, at the rebuttal phase. I don't recall their testimony relating to testimony of Offie Evans at trial specifically.

BY MS. WESTMORELAND:

Q. And as to Deputy Hamilton who did testify at trial and did indicate he was the one, I believe, obtaining the initial contact with Mr. Evans, you did not talk to him prior to the state habeas proceeding; is that correct?

A. Excuse me. I cannot say at this point that I did or did not. It is possible, but I don't have any recollection of [51] doing it.

Q. And you never requested any records from the Atlanta Police Department prior to the first state habeas corpus proceeding; is that correct?

A. I did request records from the Atlanta Police Bureau. They were records related to the race discrimination claim. But I did not request records relating to an informer claim.

MS. WESTMORELAND: All right. I have no further questions, your Honor.

THE COURT: Redirect?

MR. BOGER: No, Your Honor.

THE COURT: All right, sir. Thank you, you may go down, Mr. Stroup.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

(Caption Omitted In Printing)

ORDER

I. INTRODUCTION

Petitioner Warren McCleskey, convicted and sentenced to death in October 1978 for the murder of Police Officer Frank Schlatt during the course of a furniture store robbery,[1] petitions this court for a writ of habeas corpus on seven separate grounds: (1) that the state's non-disclosure of critical impeachment evidence violated his due process rights (the *Giglio* claim); (2) that his capital sentence was the product of intentional racial discrimination in violation of his eighth amendment and equal protection rights (the intentional discrimination claim); (3) that the trial court's denial of funds to employ experts in his defense violated his due process rights (the *Ake* claim); (4) that the use of the petitioner's alleged statements to a jailhouse informant violated his sixth amendment and due process rights (the *Massiah* claim); (5) that the state's failure to correct a witness's misleading testimony violated his eighth amendment and due process rights (the *Mooney* claim); (6) that the state's reference to appellate review in its closing argument violated his eighth amendment and due process rights (the *Caldwell* claim); and (7) that the state's systematic exclusion of black jurors violated his sixth amendment and equal protection rights (the *Batson* claim).

For the reasons discussed below, the petition for a writ of habeas corpus will be granted as to the *Massiah*

claim but denied as to all other claims. In Part II of this order the court will detail the history of the petitioner's efforts to avoid the death penalty. Then, because the successive nature of this petition dominates the court's discussion and will be dispositive of many of the issues raised by the petition, Part III will set out the general principles of finality in habeas corpus actions. Next, the court will address each of the seven claims raised in this petition; first, the successive claims in Part IV (the *Giglio*, intentional discrimination, and *Ake* claims) and then the new claims in Part V (the *Massiah*, *Mooney*, *Caldwell*, and *Batson* claims). Finally, in Part VI, the court will address the petitioner's other pending motions – a motion for discovery and a motion to exceed page limits.

II. HISTORY OF PRIOR PROCEEDINGS.

The petitioner was convicted and sentenced in the Superior Court of Fulton County on October 12, 1978. The convictions and sentences were affirmed by the Supreme Court of Georgia. *McCleskey v. State*, 245 Ga. 108 (1980). The United States Supreme Court then denied a petition for certiorari, *McCleskey v. Georgia*, 449 U.S. 891 (1980). On December 19, 1980, the petitioner filed an extraordinary motion for a new trial in Fulton County Superior Court, but no hearing has ever been held on that motion. On January 5, 1981 the petitioner filed a petition for writ of habeas corpus in the Butts County Superior Court. On April 8, 1981, that court denied all relief. On June 17, 1981 the Georgia Supreme Court denied the petitioner's application for a certificate of probable cause to appeal. The United States Supreme Court again denied a petition for a writ of certiorari *McCleskey v. Zant*. 454 U.S. 1093 (1981).

McCleskey filed his first federal habeas corpus petition in this court on December 30, 1981. This court held an evidentiary hearing in August and October 1983 and granted habeas corpus relief on one issue on February 1, 1984. *McCleskey v. Zant*, 580 F. Supp. 338 (N.D.Ga. 1984). The Eleventh Circuit reversed and denied the habeas corpus petition on January 29, 1985. *McCleskey v. Kemp*, 753 F.2d 877 (11th Cir. 1985) (en banc). This time the United States Supreme Court granted certiorari and affirmed the Eleventh Circuit on April 22, 1987. *McCleskey v. Kemp*, ___ U.S. ___, 107 S.Ct. 1756, *petition for rehearing denied*, ___ U.S. ___, 107 S.Ct. 3199 (1987). McCleskey filed a successive petition for a writ of habeas corpus in the Butts County Superior Court on June 9, 1987, and a First Amendment to the Petition on June 22, 1987 (Civil Action No. 87-V-1028). That court granted the state's motion to dismiss the petition on July 1, 1987. The Georgia Supreme Court denied the petitioner's application for a certificate of probable cause to appeal on July 7, 1987 (Application No. 4103).

This court issued an order on June 16, 1987 making the mandate of the Eleventh Circuit the judgment of this court and lifting the stay of execution that had been entered when the first federal habeas corpus petition was filed. On July 7, 1987 McCleskey filed the present petition for a writ of habeas corpus, a request to proceed *in forma pauperis*, a motion for discovery, and a motion for a stay of execution. The court granted the request to proceed *in forma pauperis* and held an evidentiary hearing on the petition on July 8 and 9, 1987. At that time, the court granted the motion for a stay of execution. The court took further evidence in a hearing on August 10, 1987 and, at

the close of the evidence, requested post-hearing briefs from the parties. Those briefs have since been filed and the petitioner's claims are ripe for determination.

III. THE DOCTRINE OF FINALITY IN HABEAS CORPUS PETITIONS.

Although successive petitions for a writ of habeas corpus are not subject to the defense of *res judicata*, Congress and the courts have fashioned a "modified doctrine of finality" which precludes a determination of the merits of a successive petition under certain circumstances. *Bass v. Wainwright*, 675 F.2d 1204, 1206 (11th Cir. 1982). In particular, Congress has authorized the federal courts to decline to address the merits of a petition if the claims contained therein were decided upon the merits previously or if any new grounds for relief that are asserted should have been raised in the previous petition. 28 USC § 2244(a) & (b). The habeas rules have described these distinct applications of the doctrine of finality as follows:

> A second or successive petition may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ.

28 USC foll. § 2254, Rule 9(b).

A purely successive petition or successive claim raises issues which have been decided adversely on a previous petition. The court may take judicial notice of allegations raised by a previous petition. *See Allen v.*

Newsome, 795 F.2d 934, 937 (11th Cir. 1986). Rule 9(b) requires that the issue raised by the previous petition must have been decided adversely to the petitioner on the merits before the doctrine of finality obtains. A merits determination need not be a determination made after an evidentiary hearing if the facts material to the successive claim were undisputed at the time of the previous petition. *Bass*, 675 F.2d at 1206.

A truly successive petition may be distinguished from the second category of petitions subject to the finality doctrine: petitions alleging new claims that may be an "abuse of the writ." 28 USC § 2244(b); 28 USC foll. § 2254, Rule 9(b). The state has the burden of pleading abuse of the writ; the burden then shifts to the petitioner to show that he has not abused the writ. *Price v. Johnston*, 334 U.S. 266, 292-93 (1948); *see also Allen v. Newsome*, 795 F.2d 934, 938-39 (11th Cir. 1986). To meet his burden, a petitioner must "give a good excuse for not having raised his claims previously." *Allen* 794 F.2d at 939. An evidentiary hearing on an abuse of the writ defense is not necessary if the record affords an adequate basis for decision. *Price*, 334 U.S. at 292-93.

As this circuit has articulated the issue presented by an abuse of the writ defense, "[a] district court need not consider a claim raised for the first time in a second habeas petition, unless the petitioner establishes that the failure to raise the claim earlier was not the result of intentional abandonment or withholding or inexcusable neglect." *Adams v. Dugger*, 816 F.2d 1493, 1494 (11th Cir. 1987) (citations omitted). *See also Moore v. Kemp*, 824 F.2d 847, 851 (11th Cir. 1987). There are a number of instances in which failure to raise an issue in a prior petition is

excusable. "A retroactive change in the law and newly discovered evidence are examples." 28 USC foll. § 2254, Rule 9 Advisory Committee Notes. *See, e.g., Ritter v. Thigpen*, 828 F.2d 662, 665 (11th Cir. 1987); *Adams*, 816 F.2d at 1495. Of course, failure to discover evidence supportive of a claim prior to the first petition may itself constitute inexcusable neglect or deliberate bypass. *Cf. Freeman v. Georgia*, 599 F.2d 65, 71-72 (5th Cir. 1979) (no procedural default where petitioner was misled by police and could not have uncovered evidence supportive of a claim in any event).[2]

Even if a particular claim is truly successive or, if it is a new claim, is an abuse of the writ, a court may consider the merits of the claim if "the ends of justice" would be served thereby. *See Sanders v. United States*, 373 U.S. 1, 16 (1963) (successive claim); *id.* at 18 (new claim); *Smith v. Kemp*, 715 F.2d 1459, 1468 (11th Cir. 1983) (successive claim); *Moore v. Kemp*, 824 F.2d at 856 (new claim). The burden is upon the petitioner to show that the ends of justice would be served. *Sanders*, 373 U.S. at 17.

The "ends of justice" exception has been subject to differing interpretations. The Court in *Sanders* suggested some circumstances in which the "ends of justice" would be served by re-visiting a successive claim:

> If factual issues are involved, the applicant is entitled to a new hearing upon a showing that the evidentiary hearing on the prior application was not full and fair; we canvassed the criteria of a full and fair evidentiary hearing recently in *Townsend v. Sain*, [372 U.S. 293 (1963)], and that discussion need not be repeated here. If purely legal questions are involved, the applicant may be entitled to a new hearing upon showing an

> intervening change in the law or some other justification for having failed to raise a crucial point or argument in the prior application. . . . [T]he foregoing enumeration is not intended to be exhaustive; the test is "the ends of justice" and it cannot be too finely particularized.

373 U.S. at 16-17. This circuit has traditionally followed the *Sanders* articulation of the "ends of justice" exception. *See, e.g., Moore v. Kemp*, 824 F.2d at 856; *Smith v. Kemp*, 715 F.2d at 1468.

A plurality of the Supreme Court recently challenge this open-ended definition of "the ends of justice," arguing that a successive claim should not be addressed unless the petitioner "supplements his constitutional claim with a colorable showing of factual innocence." *Kuhlmann v. Wilson*, ___ U.S. ___, 106 S.Ct. 2616, 2627 (1986) (Opinion of Powell, J., joined by Burger, Rehnquist, and O'Connor, JJ.). Under this definition of the "ends of justice," the petitioner "must make his evidentiary showing even though . . . the evidence of guilt may have been unlawfully admitted." *Id.* That is, petitioner must "show a fair probability that, in light of all the evidence, including that alleged to have been illegally admitted (but with due regard to any unreliability of it) and evidence tenably claimed to have been wrongfully excluded or to have become available only after trial, the trier of facts would have entertained a reasonable doubt of his guilt." *Id.* n. 17 (quoting Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U.Chi.L.Rev. 142 (1970)).

Following *Kuhlmann*, "[i]t is not certain what standards should guide a district court in determining whether the 'ends of justice' require the consideration of

an otherwise dismissable (sic) successive habeas petition." *Moore*, 824 F.2d at 856. The Eleventh Circuit, in *Moore*, declined to decide "whether a colorable showing of factual innocence is a necessary condition for the application of the ends of justice exception." *Id*. The court merely held that, "at a minimum, the ends of justice will demand consideration of the merits of a claim on a successive petition where there is a colorable showing of factual innocence." *Id*.

IV. PETITIONER'S SUCCESSIVE CLAIMS.

Three of the petitioner's claims in this second federal habeas petition duplicate claims in the first federal petition and are therefore truly successive claims that should be dismissed according to the dictates of Rule 9(b) unless the petitioner can show that the "ends of justice" justify re-visiting the claims. Each claim will be discussed in turn.

A. Giglio Claim

Petitioner's *Giglio* claim is based upon the state's failure to disclose its agreement with a witness, Offie Evans, which led him to testify against petitioner at trial. McCleskey argues that the state's failure to disclose the promise by a police detective to "speak a word" for Offie Evans with regard to an escape charge violated McCleskey's due process rights under *Giglio v. United States*, 405 U.S. 150 (1971). *Giglio* held that failure to disclose the possible interest of a government witness will entitle a defendant to a new trial if there is a reasonable likelihood that the disclosure would have affected

the judgment of the jury. *Id*. at 154. This court granted habeas corpus relief on this claim in passing upon the first federal habeas petition, but the Eleventh Circuit reversed en banc. *McCleskey v. Zant*, 580 F.Supp. at 380-84, *rev'd sub nom. McCleskey v. Kemp*, 753 F.2d at 885.

McCleskey argues that the ends of justice require revisiting his *Giglio* claim for three reasons. He argues that the discovery of a written statement by Offie Evans provides new evidence of a relationship between Offie Evans and the state supportive of a finding of a *quid pro quo* for Offie Evans' testimony. He also proffers the affidavit testimony of jurors who indicate that they might have reached a different verdict had they know the real interest of Offie Evans in testifying against petitioner. Finally, petitioner contends that there has been a change in the law regarding the materiality standard for a finding of a *Giglio* violation.

None of these arguments is sufficient to justify revisiting the *Giglio* claim. The written statement of Offie Evans offers no new evidence of an agreement by state authorities to do Offie Evans a favor if he would testify against petitioner. Consequently, the conclusion of the Eleventh Circuit that the detective's promise did not amount to a promise of leniency triggering *Giglio* is still valid. *See McCleskey v. Kemp*, 753 F.2d at 885. Because the threshold showing of a promise still has not been made, the ends of justice would not be served by allowing petitioner to press this claim again.

Petitioner also has no newly discovered evidence with respect to the materiality of the state's failure to disclose its arrangement with Offie Evans. The affidavit

testimony of the jurors is not evidence that petitioner could not have obtained at the time of the first federal habeas petition. In any event, a juror is generally held incompetent to testify in impeachment of a verdict. Fed. R. Evid. 606(b); *Proffitt v. Wainwright*, 685 F.2d 1227, 1255 (11th Cir. 1982). *See generally McCormick on Evidence* § 608 (3d Ed. 1984).

Finally, petitioner can point to no change in the law on the standard of materiality. The Eleventh Circuit concluded in this case that there was "no 'reasonable likelihood' that the State's failure to disclose the detective's [promise] affected the judgment of the jury." *McCleskey*, 753 F.2d at 884. The same standard still guides this circuit in its most recent decisions on the issue. *See, e.g., United States v. Burroughs*, No. 86-3566, Slip Op. at 381 (11th Cir., Nov. 3, 1987); *Brown*, 785 F.2d at 1464 (citing *McCleskey v. Kemp*, 753 F.2d at 885).

B. Intentional Discrimination Claim.

Having lost in the Supreme Court[3] on his contentions regarding the Baldus Study, the petitioner nevertheless trotted it out to support the more narrow contention that McCleskey was singled out both because he is black and because his victim was white.

The Baldus Study is said to be the most ambitious yet. It is. The part of it that is ambitious, however – the 230-variable model structured and validated by Dr. Baldus – did not adduce one smidgen of evidence that the race of the defendants or the race of the victims had any effect on the Georgia prosecutors' decisions to seek the death penalty or the juries' decisions to impose it. The

model that Dr. Baldus testified accounted for all of the neutral variables did not produce any "death-odds multiplier" of 4 or 6 or 11 or 14 or any of the other numbers which the media have reported.

To be sure, there are some exhibits that would show discrimination and do contain such multipliers. But these were not produced by the "ambitious" 230-variable model of the study. The widely-reported "death-odd multipliers" were produced instead by arbitrarily structured little rinky-dink regressions that accounted for only a few variables. They are of the sort of statistical analysis given short shrift by courts and social scientists alike in the past. They prove nothing other than the truth of the adage that anything may be proved by statistics.

The facts are that the only evidence of over-zealousness or improprieties by any person(s) in the law enforcement establishment points to the black case officers of the Atlanta Bureau of Police Services,[4] which was then under the leadership of a black superior who reported to a black mayor in a majority black city. The verdict was returned by jury on which a black person sat and, although McCleskey has adduced affidavits from jurors on other subjects, there is no evidence that the black juror voted for conviction and the death penalty because she was intimidated by the white jurors. It is most unlikely that any of these black citizens who played vital roles in this case charged, convicted or sentenced McCleskey because of the racial considerations alleged.

There is no other evidence that race played a part in this case.

C. Ake Claim.

Petitioner's last truly successive claim is based upon the trial court's denial of his request for the provision of funds for experts, particularly for a ballistics expert. Petitioner alleges that this ruling by the trial court denied him his right to due process of law as guaranteed by the fourteenth amendment Petitioner raised this same claim in the first federal habeas petition and this court held that the claim was without merit. *McCleskey v. Zant*, 580 F. Supp. at 388-89 (citing *Moore v. Zant*, 722 F.2d 640 (11th Cir. 1983)). At that time the law held that the appointment of experts was generally a matter within the discretion of the trial judge and could not form the basis for a due process claim absent a showing that the trial judge's decision rendered the defendant's trial fundamentally unfair. *Moore*, 772 F.2d at 648. With that case law in mind, this court concluded that the state trial court had not abused its discretion because the petitioner had the opportunity to subject the state's ballistics expert to cross-examination and because there was no showing of bias or incompetence on the part of the state's expert. *McCleskey v. Zant*, 580 F. Supp. at 389.

Arguing that the ends of justice require re-visiting the claim, petitioner points to the cases of *Ake v. Oklahoma*, 470 U.S. 68, 83 (1985) and *Caldwell v. Mississippi*, 472 U.S. 320, 323 n. 1 (1985) (plurality), as examples of a change in the law regarding the provision of experts. It may be that these cases did change the law; this matter, which was traditionally thought to rest within the discretion of state trial judges, now has heightened constitutional significance. *Compare Moore v. Zant*, 722 F.2d at 648, *with Moore v. Kemp*, 809 F.2d 702, 709-12 (11th Cir. 1987).

Even so, this new law does not justify re-visiting this claim. The new Supreme Court cases require "that a defendant must show the trial court that there exists a reasonable probability both that an expert would be of assistance to the defense and that denial of expert assistance would result in a fundamentally unfair trial. Thus, if a defendant wants an expert to assist his attorney in confronting the prosecution's proof . . . he must inform the court of the nature of the prosecution's case and how the requested expert would be useful." *Moore v. Kemp*, 809 F.2d at 712. A review of the state trial record indicates that petitioner did nothing more than generally refer to the extensive expert testimony available to the state. Petitioner then specifically requested the appointment of a *psychiatric* expert. The petitioner never specifically requested the appointment of a ballistic expert, nor did he make the showing that this circuit has held is required by *Ake* and *Caldwell*. The state trial court could hardly have been expected to appreciate the importance of a ballistics expert to petitioner's case if petitioner himself neither requested such an expert nor explained the significance of such an expert to the court.

V. PETITIONER'S NEW CLAIMS.

A. Massiah Claim.

1. Findings of Fact.

Petitioner relies primarily on the testimony of Ulysses Worthy before this court and the recently disclosed written statement of Offie Evans to support his *Massiah* claim. Ulysses Worthy, who was captain of the day watch at the Fulton County Jail during the summer

of 1978 when petitioner was being held there awaiting his trial for murder and armed robbery, testified before this court on July 9 and August 10, 1987. The court will set out the pertinent parts of that testimony and then summarize the information it reveals.

On July 9, Worthy testified as follows: He recalled "something being said" to Evans by Police Officer Dorsey or another officer about engaging in conversations with McCleskey (II Tr. 147-49).[5] He remembered a conversation, where Detective Dorsey and perhaps other officers were present, in which Evans was asked to engage in conversations with McCleskey (II Tr. 150). Later, Evans requested permission to call the detectives (II Tr. 151). Assistant District Attorney Russell Parker and Detective Harris used Worthy's office to interview Evans at one point, which could have been the time they came out to the jail at Evans' request (*Id.*).

In other cases, Worthy had honored police requests that someone be placed adjacent to another inmate to listen for information (II Tr. 152); such requests usually would come from the officer handling the case (*Id.*); he recalled specifically that such a request was made in this case by the officer on the case (II Tr. 153). Evans was put in the cell next to McCleskey at the request of the officer on the case (*Id.*); "someone asked [him] to specifically place Officer Evans in a specific location in the Fulton County Jail so he could overhear conversations with Warren McCleskey," but Worthy did not know who made the request and he was not sure whether the request was made when Evans first came into the jail (II Tr. 153-54); he did not recall when he was asked to move Evans (II Tr. 155-56).

On August 10, 1987 Worthy testified as follows: Evans was first brought to his attention when Deputy Hamilton brought Evans to Worthy's office because Evans wanted to call the district attorney or the police with "some information he wanted to pass to them" (III Tr. 14). The first time the investigators on the Schlatt murder case talked to Evans was "a few days" after Evans' call (III Tr. 16-17). That meeting took place in Worthy's office (III Tr. 17). Worthy was asked to move Evans "from one cell to another" (III Tr. 18). Worthy was "not sure" who asked, "but it would have had . . . to have been one of the officers," Deputy Hamilton, or Evans (III Tr. 18-19). Deputy Hamilton asked Worthy to move Evans "perhaps 10, 15 minutes" after Evans' interview with the investigators (III Tr. 20). This was the first and only time Worthy was asked to move Evans (*Id.*). Deputy Hamilton would have been "one of the ones" to physically move Evans (III Tr. 22). Worthy did not know for a fact that Evans was ever actually moved (*Id.*). The investigators later came out to interview Evans on other occasions, but not in Worthy's presence (III Tr. 23). Neither Detectives Harris, Dorsey or Jowers nor Assistant District Attorney Parker ever asked Worthy to move Evans (III Tr. 24).

On cross-examination, Worthy re-affirmed portions of his July 9 testimony: He overheard someone ask Evans to engage in conversation with McCleskey at a time when Officer Dorsey and another officer were present (III Tr. 32-33). Evans requested permission to call the investigators after he was asked to engage in conversation with McCleskey (III Tr. 33). Usually the case officer would be the one to request that an inmate be moved and that was the case with Evans, though he does not know exactly

who made the request (III Tr. 46-48). Worthy also contradicted portions of his July 9 testimony, stating that the interview at which Assistant District Attorney Parker was present was the first time Evans was interviewed and that Worthy had not met Officer Dorsey prior to that time (III Tr. 36). On further cross-examination, Worthy testified as follows: Deputy Hamilton was not a case officer but was a deputy at the jail (III Tr. 49). When Worthy testified on July 9 he did not know what legal issues were before the court (III Tr. 52-53). After his July 9 testimony he met with the state's attorneys on two occasions for a total of forty to fifty minutes (III Tr. 53-54). After his July 9 testimony he read a local newspaper article mentioning him (III Tr. 56).

In response to questions from the court, Worthy stated that he was satisfied that he was asked for Evans "to be placed near McCleskey's cell," that "Evans was asked to overhear McCleskey talk about this case," and that Evans was asked to "get some information from" McCleskey (III Tr. 64-65). Worthy maintained that these requests were made on the date that Assistant District Attorney Parker interviewed Evans, but he could not explain why the investigators would have requested a move on the same day that Evans had already told the investigators that he was next to McCleskey, that he had been listening to what McCleskey had been saying, and that he had been asking McCleskey questions (III Tr. 64).

In summary, Worthy never wavered from the fact that someone, at some point, requested his permission to move Evans to be near McCleskey. Worthy's July 9 testimony indicates the following sequence: The request to

move Evans, the move, Evans' request to call the investigators, the Parker interview, and other later interviews. Worthy's August 10 testimony indicates a different sequence: Evans' request to call the investigators, the Parker interview, the request to move Evans by Deputy Hamilton, and other later interviews. Worthy's testimony is inconsistent on Officer Dorsey's role in requesting the move, on whether Deputy Hamilton requested the move, and on whether the request to move Evans preceded Evans' request to call the investigators. Worthy has no explanation for why the authorities would have requested to move Evans after the Parker interview, at which Evans made it clear that he was already in the cell adjacent to McCleskey's.

All of the law enforcement personnel to whom Worthy informed – Deputy Hamilton, Detectives Dorsey, Jowers and Harris, and Assistant District Attorney Parker – flatly denied having requested permission to move Evans or having any knowledge of such a request being made (III Tr. 68-71); 80-81, 95; 97-98; 102-03; 111-12, 116). It is undisputed that Assistant District Attorney Parker met with Evans at the Fulton County Jail on only one occasion, July 12, 1978, and that Evans was already in the cell next to McCleskey's at that time (III Tr. 113-14; 71-72).

Petitioner also relies on Evans' twenty-one page statement to the Atlanta Police Department, dated August 1, 1978, in support of his claim that the authorities deliberately elicited incriminating information from him in violation of his sixth amendment right to counsel. Evans' statement relates conversations he overheard between McCleskey and McCleskey's co-defendant DuPree and conversations between himself and

McCleskey from July 9 to July 12, 1978. McCleskey's statements during the course of those conversations were highly incriminating. In support of his argument that the authorities instigated Evans' information gathering, McCleskey points to the methods Evans used to secure McCleskey's trust and thereby stimulate incriminating conversation. Evans repeatedly lied to McCleskey, telling him that McCleskey's co-defendant, Ben Wright, was Evans' nephew; that Evans' name was Charles; that Ben had told Evans about McCleskey; that Evans had seen Ben recently; that Ben was accusing McCleskey of falsely identifying Ben as the "trigger man" in the robbery; that Evans "used to stick up with Ben too;" that Ben told Evans that McCleskey shot Officer Schlatt; and that Evans was supposed to have been in on the robbery himself.

In addition, McCleskey argues that Evans' knowledge that McCleskey and other co-defendants had told police that co-defendant Ben Wright was the trigger person demonstrates Evans' collusion with the police since that fact had not been made public at that time. Finally, McCleskey points to two additional pieces of evidence about Evans' relationship with the police: Evans testified at McCleskey's trial that he had talked to Detective Dorsey about the case before he talked to Assistant District Attorney Parker (Pet. Exh. 16 at 119); and Evans had acted as an informant for Detective Dorsey before (II Tr. 52-3).

The factual issue for the court to resolve is simply stated: Either the authorities moved Evans to the cell adjoining McCleskey's in an effort to obtain incriminating information or they did not. There is evidence to support the argument that Evans was not moved, that he was in

the adjoining cell fortuitously, and that his conversations with McCleskey preceded his contact with the authorities. Worthy's testimony is often confused and self-contradictory, it is directly contrary to the testimony of Deputy Hamilton and Detective Dorsey, it is contrary to Evans' testimony at McCleskey's trial that he was put in the adjoining cell "straight from the street" (Trial Tr. 873), and it is contrary to the opening line of Evans' written statement which says, "I am in the Fulton County Jail cell # 1 north 14 where I have been since July 3, 1978 for escape." Worthy himself testified that escape risks where (sic) housed in that wing of the jail (III Tr. 13-14). Moreover, the use of Evans as McCleskey alleges, if it occurred, developed into a complicated scheme to violate McCleskey's constitutional rights – its success required Evans and any officers involved to lie and lie well about the circumstances. For these reasons, the state asks this court to reject Worthy's testimony that someone requested permission to move Evans next to McCleskey's cell.

After carefully considering the substance of Worthy's testimony, his demeanor, and the other relevant evidence in this case, the court concludes that it cannot reject Worthy's testimony about the fact of a request to move Offie Evans. The fact that someone, at some point, requested his permission to move Evans is the one fact from which Worthy never wavered in his two days of direct and cross-examination. The state has introduced no affirmative evidence that Worthy is either lying or mistaken. The lack of corroboration by other witnesses is not surprising; the other witnesses, like Assistant District Attorney Parker, had no reason to know of a request to

move Evans or, like Detective Dorsey, had an obvious interest in concealing any such arrangement. Worthy, by contrast, had no apparent interest or bias that would explain any conscious deception. Worthy's testimony that he was asked to move Evans is further bolstered by Evans' testimony that he talked to Detective Dorsey before he talked to Assistant District Attorney Parker and by Evans' apparent knowledge of details of the robbery and homicide known only to the police and the perpetrators.

Once it is accepted that Worthy was asked for permission to move Evans, the conclusion follows swiftly that the sequence of events to which Worthy testified originally must be the correct sequence; i.e., the request to move Evans, the move, Evans' request to call the investigators, the Parker interview, and other later interviews. There are two other possible conclusions about the timing of the request to move Evans, but neither is tenable. First, the request to move Evans could have come following Evans' meeting with Assistant District Attorney Parker, as Worthy seemed to be testifying on August 10 (III Tr. 20). However, a request at that point would have been non-sensical because Evans was already in the cell adjoining McCleskey's. Second, it could be that Evans was originally in the cell next to McCleskey, that he overheard the incriminating statements prior to any contact with the investigators, that McCleskey was moved to a different cell, and that the authorities then requested permission to move Evans to again be adjacent to McCleskey. As the state concedes, this possibility is mere speculation and is not supported by any evidence in the record. Post-Hearing Brief at 53.

For the foregoing reasons, the court concludes that petitioner has established by a preponderance of the evidence the following sequence of events: Evans was not originally in the cell adjoining McCleskey's; prior to July 9, 1978, he was moved, pursuant to a request approved by Worthy, to the adjoining cell for the purpose of gathering incriminating information; Evans was probably coached in how to approach McCleskey and given critical facts unknown to the general public; Evans engaged McCleskey in conversation and eavesdropped on McCleskey's conversations with DuPree; and Evans reported what he had heard between July 9 and July 12, 1978 to Assistant District Attorney Parker on July 12.

2. Abuse of the Writ Questions.

The state argues that petitioner's *Massiah* claim in this second federal habeas petition is an abuse of the writ because he intentionally abandoned the claim after his first state habeas petition and because his failure to raise this claim in his first federal habeas petition was due to inexcusable neglect. As was noted earlier, the burden is on petitioner to show that he has not abused the writ. *Allen*, 795 F.2d at 938-39. The court concludes that petitioner's *Massiah* claim is not an abuse of the writ.

First, petitioner cannot be said to have intentionally abandoned this claim. Although petitioner did raise a *Massiah* claim in his first state petition, that claim was dropped because it was obvious that it could not succeed given the then-known facts. At the time of his first federal petition, petitioner was unaware of Evans' written

statement, which, as noted above, contains strong indications of an *ab initio* relationship between Evans and the authorities. Abandoning a claim whose supporting facts only later become evident is not an abandonment that "for strategic, tactical, or any other reasons . . . can fairly be described as the deliberate by-passing of state procedures." *Fay v. Noia*, 372 U.S. 391, 439 (1963), quoted in *Potts v. Zant*, 638 F.2d 727, 743 (5th Cir. 1981). Petitioner's *Massiah* claim is therefore not an abuse of the writ on which no evidence should have been taken. This is not a case where petitioner has reserved his proof or deliberately withheld his claim for a second petition. *Cf. Sanders v. United States*, 373 U.S. 1, 18 (1963). Nor is the petitioner now raising an issue identical to one he earlier considered without merit. *Cf. Booker v. Wainwright*, 764 F.2d 1371, 1377 (11th Cir. 1985).

Second, petitioner's failure to raise this claim in his first federal habeas petition was not due to his inexcusable neglect. When the state alleges inexcusable neglect, the focus is on "the petitioner's conduct and knowledge at the time of the preceding federal application. . . . He is chargeable with counsel's actual awareness of the factual and legal bases of the claim at the time of the first petition and with the knowledge that would have been possessed by reasonably competent counsel at the time of the first petition." *Moore*, 824 F.2d at 851. Here, petitioner did not have Evans' statement or Worthy's testimony at the time of his first federal petition; there is therefore no inexcusable neglect unless "reasonably competent counsel" would have discovered the evidence prior to the first federal petition. This court concluded at the evidentiary hearing that petitioner's counsel's failure to discover

Evans' written statement was not inexcusable neglect (I Tr. 118-19). The same is true of counsel's failure to discover Worthy's testimony. Petitioner's counsel represents, and the state has not disputed, that counsel did conduct an investigation of a possible *Massiah* claim prior to the first federal petition, including interviewing "two or three jailers." Petitioner's Post-Hearing Reply Brief at 5. The state has made no showing of any reason that petitioner or his counsel should have known to interview Worthy specifically with regard to the *Massiah* claim. The state argues that petitioner's counsel should have at least interviewed Detectives Harris and Dorsey and Deputy Hamilton. Given that all three denied any knowledge of a request to move Evans next to McCleskey, it is difficult to see how conducting such interviews would have allowed petitioner to assert this claim any earlier. *See Ross v. Kemp*, 785 F.2d 1467, 1478 (11th Cir. 1986) (remanding for evidentiary hearing on inexcusable neglect where petitioner's counsel may have relied on misrepresentations by the custodian of the relevant state records).

In short, the petitioner's *Massiah* claim as it is currently framed is not an abuse of the writ because it is distinct from the *Massiah* claim originally raised in his first state petition and because it is based on new evidence. Petitioner's failure to discover this evidence earlier was not due to inexcusable neglect. Because this claim is not an abuse of the writ it is not a successive petition under section 2244(b) and therefore the court need not inquire whether the petitioner has made a colorable showing of factual innocence, if that showing is now the equivalent of the "ends of justice." *Kuhlmann*, 106 S.Ct. at 2628 n. 18.

3. Conclusions of Law.

The Eleventh Circuit recently summarized the petitioner's burden in cases such as this:

> In order to establish a violation of the Sixth Amendment in a jailhouse informant case, the accused must show (1) that a fellow inmate was a government agent; and (2) that the inmate deliberately elicited incriminating statements from the accused.

Lightbourne v. Dugger, 829 F.2d 1012, 1020 (11th Cir. 1987). The coincidence of similar elements first led the Supreme Court to conclude that such a defendant was denied his sixth amendment right to assistance of counsel in *Massiah v. United States*, 377 U.S. 201 (1964). In that case, the defendant's confederate cooperated with the government in its investigation and allowed his automobile to be "bugged." The confederate subsequently had a conversation in the car with the defendant during which the defendant made incriminating statements. The confederate then testified about the defendant's statements at the defendant's trial. The Supreme Court held that the defendant had been "denied the basic protections of [the sixth amendment] when it was used against him at his trial evidence of his own incriminating words, which federal agents had deliberately elicited from him after he had been indicted and in the absence of his counsel." *Id.* at 206.[6]

The Supreme Court applied its ruling in *Massiah* to the jailhouse informant situation in *United States v. Henry*, 447 U.S. 264 (1980). In that case, a paid informant for the FBI happened to be an inmate in the same jail in which

defendant Henry was being held pending trial. An investigator instructed the informant inmate to pay particular attention to statements made by the defendant, but admonished the inmate not to solicit information from the defendant regarding the defendant's indictment for bank robbery. The inmate engaged the defendant in conversations regarding the bank robbery and subsequently testified at trial against the defendant based upon these conversations. The Supreme Court held that the inmate had deliberately elicited incriminating statements by engaging the defendant in conversation about the bank robbery. *Id.* at 271. It was held irrelevant under *Massiah* whether the informant questioned the defendant about the crime or merely engaged in general conversation which led to the disclosure of incriminating statements about the crime. *Id.* at 271-72 n. 10. Although the government insisted that it should not be held responsible for the inmate's interrogation of the defendant in light of its specific instructions to the contrary, the Court held that employing a paid informant who converses with an unsuspecting inmate while both are in custody amounts to "intentionally creating a situation likely to induce [the defendant] to make incriminating statements without the assistance of counsel." *Id.* at 274.[7]

Given the facts established earlier, petitioner has clearly established a *Massiah* violation here. It is clear from Evans' written statement that he did much more than merely engage petitioner in conversation about petitioner's crimes. As discussed earlier, Evans repeatedly lied to petitioner in order to gain his trust and to draw him into incriminating statements. Worthy's testimony

establishes that Evans, in eliciting the incriminating statements, was acting as an agent of the state. This case is completely unlike *Kuhlmann v. Wilson*, 106 S.Ct. 2616 (1986), where the Court found no *Massiah* violation because the inmate informant had been a passive listener and had not deliberately elicited incriminating statements from the defendant. Here, Evans was even more active in eliciting incriminating statements than was the informant in *Henry*. The conclusion is inescapable that petitioner's sixth amendment rights, as interpreted in *Massiah*, were violated.

However, "[n]ot every interrogation in violation of the rule set forth in *Massiah* . . . mandates reversal of a conviction." *United States v. Kilrain*, 566 F. 2d 979, 982 (5th Cir. 1978). Instead, "the proper rule [is] one of exclusion of tainted evidence rather than a *per se* standard of reversal if any constitutional violation ha[s] occurred." *Id.* n. 3, citing *Brewer v. Williams*, 430 U.S. 387, 407 n. 12 (1977); *United States v. Hayles*, 471 F.2d 788, 793, *cert. denied*, 411 U.S. 969 (5th Cir. 1973). In other words, "certain violations of the right to counsel may be disregarded as harmless error." *United States v. Morrison*, 449 U.S. 361, 365 (1981), citing *Chapman v. California*, 386 U.S. 18, 23 n. 8 (1967). To avoid reversal of petitioner's conviction the state must "prove beyond a reasonable doubt that the error complained of [the use at petitioner's trial of his own incriminating statements obtained in violation of his sixth amendment rights] did not contribute to the verdict obtained." *Chapman*, 386 U.S. at 24. *See also Brown v. Dugger*, No. 85-6082, Slip Op. at 511-12 (11th Cir. November 13, 1987).

Once the fact of the *Massiah* violation in this case is accepted, it is not possible to find that the error was harmless. A review of the evidence presented at the petitioner's trial reveals that Evans' testimony about the petitioner's incriminating statements was critical to the state's case. There were no witnesses to the shooting and the murder weapon was never found. The bulk of the state's case against the petitioner was three pronged: (1) evidence that petitioner carried a particular gun on the day of the robbery that most likely fired the fatal bullets; (2) testimony by co-defendant Ben Wright that petitioner pulled the trigger; and (3) Evans' testimony about petitioner's incriminating statements. As petitioner points out, the evidence on petitioner's possession of the gun in question was conflicting and the testimony of Ben Wright was obviously impeachable.[8] The state also emphasizes that Evans testified only in rebuttal and for the sole purpose of impeaching McCleskey's alibi defense. But the chronological placement of Evans' testimony does not dilute its impact – "merely" impeaching the statement "I didn't do it" with the testimony "He told me he did do it" is the functional equivalent of case in chief evidence of guilt.

For the foregoing reasons, the court concludes that petitioner's sixth amendment rights, as interpreted in *Massiah*, were violated by the use at trial of Evans' testimony about the petitioner's incriminating statements because those statements were deliberately elicited by an agent of the state after petitioner's indictment and in the absence of petitioner's attorney. Because the court cannot say, beyond a reasonable doubt, that the jury would have

convicted petitioner without Evans' testimony about petitioner's incriminating statements, petitioner's conviction for the murder of Officer Schlatt must be reversed pending a new trial.[9]

Unfortunately, one or more of those investigating Officer Schlatt's murder stepped out of line. Determined to avenge his death, the investigator(s) violated clearly-established case law, however artificial or ill-conceived it might have appeared. In so doing, the investigator(s) ignored the rule of law that Officer Schlatt gave his life in protecting and thereby tainted the prosecution of his killer.

B. Mooney Claim.

Petitioner's *Mooney* claim is based upon the state's use at trial of misleading testimony by Offie Evans, which petitioner contends violated his eighth amendment rights and his right to due process of law under the fourteenth amendment. *See Mooney v. Holohan*, 294 U.S. 103, 112 (1935) (criminal conviction may not be obtained using testimony known to be perjured). In particular, petitioner contends that the state failed to correct Evans' misleading testimony regarding his real interest in testifying against petitioner, regarding the circumstances surrounding his cooperation with the state, and regarding petitioner's confession of having shot Officer Schlatt. Petitioner alleges that the newly discovered statement of Offie Evans reveals these misleading elements of Offie Evans' testimony at trial.

Petitioner's allegation that the state misled the jury with Offie Evans' testimony that he was a disinterested witness is actually a restatement of petitioner's *Giglio* claim. The allegation that the state misled the jury with Offie Evans' testimony that he happened to inform the state of petitioner's incriminating statements, when in fact the evidence suggests that Offie Evans may have been an agent of the state, is a restatement of petitioner's *Massiah* claim. Consequently, only the allegations of misleading testimony regarding the actual shooting need to be addressed as allegations supportive of a separate *Mooney* claim.

As a preliminary matter, the failure of petitioner to raise this claim in his first federal habeas petition raises the question of abuse of the writ. Because this claim is based upon the newly discovered statement of Offie Evans, the same conclusion reached as to the *Massiah* claim obtains for this claim. It was not an abuse of the writ to fail to raise the *Massiah* claim earlier and it was not an abuse of the writ to have failed to raise this claim earlier.

However, on its merits the claim itself is unavailing. In order to prevail on this claim, petitioner must establish that the state did indeed use false or misleading evidence and that the evidence was "material" in obtaining petitioner's conviction or sentence or both. *Brown v. Wainwright*, 785 F.2d 1457, 1465 (11th Cir. 1986). The test for materiality is whether there is "any reasonable likelihood that the false testimony could have affected the judgment of the jury." *Id.* at 1465-66 (quoting *United States v. Bagley*,

___ U.S. ___, 105 S.Ct. 3375, 3382 (1985) (plurality)). Petitioner's allegations of misleading testimony regarding his confession fail for two reasons.

First, no false or misleading testimony was admitted at trial. A comparison of Offie Evans' recently discovered statement and his testimony at trial reveals substantially identical testimony regarding McCleskey's confession that he saw the policeman with a gun and knew there was a choice between getting shot by the policeman or shooting the policeman. *Compare* Pet. Exhibit E, at 6 *with* Trial Tr. at 870. While Offie Evans did use the word "panic" in his written statement when describing this dilemma, the addition of this word adds nothing to the substance of the trial testimony, which conveyed to the jury the exigencies of the moment when petitioner fired upon Officer Schlatt. Second, even if the omission of this one phrase did render the testimony of Offie Evans misleading, this claim would fail because there is no reasonable likelihood that the jury's judgment regarding petitioner's guilt and his sentencing would have been altered by the addition of the phrase "panic" to otherwise substantially identical testimony.

C. Caldwell Claim.

Petitioner's third new claim is based upon references by the prosecutor at petitioner's trial to appellate review of the jury sentencing decision and to the reduction on appeal of prior life sentences imposed on petitioner. These references are said to have violated petitioner's eighth amendment rights and right to due process of law as guaranteed by the fourteenth amendment.

To the extent petitioner claims that the reference to the reduction of prior life sentences was constitutionally impermissible in that it led the jury to impose the death penalty for improper or irrelevant reasons, *see Tucker v. Francis*, 723 F.2d 1504 (11th Cir. 1984), this claim comes too late in the day. Petitioner was aware of these comments at the time he filed his first federal habeas petition but did not articulate this claim at that time. Because the state has pled abuse of the writ, petitioner must establish that the failure to raise this claim during the first federal habeas proceeding was not due to intentional abandonment or inexcusable neglect. Petitioner has offered no excuse for not raising this claim before. He was represented by competent counsel at the time and should not be heard to argue that he was unaware that these facts would support the claim for habeas relief. Indeed, this court recognized the potential for such a claim when passing upon the first federal habeas petition and concluded "it has not been raised by fully competent counsel." *McCleskey v. Kemp*, 580 F. Supp. at 388 n. 27.

Successive petition and abuse of the writ problems also plague this claim to the extent that petitioner is arguing that the prosecutor's reference to the appellate process somehow diminished the jury's sense of responsibility during the sentencing phase. This claim in due process terms was presented to this court by the first federal habeas petition and rejected. *McCleskey v. Zant*, 580 F. Supp. at 387-88 (citing *inter alia Corn v. Zant*, 708 F.2d 549, 557 (11th Cir. 1983)). Petitioner has offered no reason that the ends of justice would be served by revisiting this due process claim.

Petitioner also argues that reference to the appellate process violated his eighth amendment rights. Although petitioner did not articulate this eighth amendment claim at the time of the first federal habeas proceeding, the failure to raise the claim at that time does not amount to an abuse of the writ. Only after this court ruled upon the first federal habeas petition did the Supreme Court indicate that it is a violation of the eighth amendment "to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." *Caldwell v. Mississippi*, 472 U.S. 320, 328-29 (1985). This circuit has recently held that failure to raise a *Caldwell* claim in a first federal habeas petition filed before the decision does not amount to abuse of the writ because there has been a change in the substantive law. *Adams v. Dugger*, 816 F.2d 1493, 1495-96 (11th Cir. 1987) (per curiam).

Although this court must reach the merits of the *Caldwell* claim, the claim itself fails for the same reasons that the due process proof of this claim failed. The essential question is whether the comments likely caused the jury to attach diminished consequences to their deliberations on the death penalty. *See McCleskey v. Zant*, 580 F. Supp. at 388. A review of the prosecutor's actual comments at petitioner's trial does not reveal any impermissible suggestions regarding the appellate process which would have led the jury to believe that the responsibility for imposing the death penalty rested elsewhere. As this court observed when passing upon the due process claim raised by the first petition,

> The prosecutor's arguments in this case did not intimate to the jury that a death sentence could be reviewed or set aside on appeal. Rather, the prosecutor's argument referred to petitioner's prior criminal records and the sentences he had received. The court cannot find that such arguments had the effect of diminishing the jury's sense of responsibility for its deliberations on petitioner's sentence. Insofar as petitioner claims that the prosecutor's arguments were impermissible because they had such an effect, the claim is without merit.

McCleskey v. Zant, 580 F. Supp. at 388.

D. Batson Claim.

Petitioner's final claim rests upon the alleged systematic exclusion of black jurors by the prosecutor at petitioner's trial. This exclusion is said to have violated petitioner's right to a representative jury as guaranteed by the sixth and fourteenth amendments.

This claim was not raised during the first federal habeas proceedings. However, failure to raise this claim could not be said to constitute abuse of the writ because prior to the Supreme Court's decision in *Batson v. Kentucky*, ___ U.S. ___, 107 S.Ct. 708 (1987), petitioner could not have made out a prima facie claim absent proof of a pattern of using preemptory strikes to exclude black jurors in trials other than petitioner's. *See id.* at 710-11. (citing *Swain v. Alabama*, 380 U.S. 202 (1965)).

Although petitioner did not abuse the writ by failing to raise this claim earlier, the claim itself lacks merit. The holding in *Batson*, which allows defendants to make the

prima facie showing of an unrepresentative jury by proving a systematic exclusion of blacks from their own jury, has not been given retroactive application. The *Batson* decision does not apply retroactively to collateral attacks "where the judgment of conviction was rendered, the availability of appeal exhausted, and the time for petition for certiorari had elapsed" before the *Batson* decision. *Allen v. Hardy*, ___ U.S. ___, 106 S.Ct. 2878, 2880 n. 1 (1986) (per curiam). Although the *Allen* decision did not involve a habeas petitioner subject to the death penalty, this circuit has specifically held that *Batson* may not be applied retroactively even to a habeas petitioner subject to the death penalty. *See Lindsey v. Smith*, 820 F.2d 1137, 1145 (11th Cir. 1987); *High v. Kemp*, 819 F.2d 988, 992 (11th Cir. 1987).

VI. OTHER MOTIONS.

Also pending before this court are petitioner's motions for discovery and for leave to exceed this court's page limits. The court presumes that the above resolution of the petitioner's various claims and the evidentiary hearing held in this case obviate the need for any further discovery. Petitioner's motion for discovery, filed before the evidentiary hearing, does not provide any reason to think otherwise. The motion for discovery is therefore DENIED. The motion to exceed page limits is GRANTED.

VII. CONCLUSION.

In summary, the petition for a writ of habeas corpus is DENIED as to petitioner's *Giglio*, intentional discrimination, and *Ake* claims because those claims are

successive and do not fall within the ends of justice exception. The petition for a writ of habeas corpus is DENIED as to petitioner's *Mooney, Caldwell* and *Batson* claims because they are without merit. Petitioner's motion for discovery is DENIED and his motion to exceed page limits is GRANTED. The petition for a writ of habeas corpus is GRANTED as to petitioner's *Massiah* claim unless the state shall re-try him within 120 days of the receipt of this order.

SO ORDERED, this 23rd day of December, 1987.

/s/ J. Owen Forrester
J. OWEN FORRESTER
UNITED STATES DISTRICT JUDGE

(ENTERED DEC 24 1987)

FOOTNOTES

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[1] Petitioner was also convicted on two counts of armed robbery and sentenced to two consecutive life sentences.

[2] Another distinct ground for finding excusable neglect is a showing that the petitioner did not realize that the facts of which he had knowledge could constitute a basis for which federal habeas corpus relief could be granted. *Booker v. Wainwright*, 764 F.2d 1371, 1376 (11th Cir. 1985). Although "[t]he exact scope of this alternative exception to the abuse of writ doctrine lacks adequate definition," *id.*, it would appear from the cases that it applies only when the petitioner appeared *pro se* in presenting the first habeas petition. *See, e.g., Haley v. Estelle*, 632 F.2d 1273, 1276 (5th Cir. 1980).

[3] " '. . . [W]e hold that the Baldus study does not demonstrate a constitutionally significant risk of racial bias affecting the Georgia capital-sentencing process." *Powell, J., for the majority). McCleskey v. Kemp*, ___ U.S. ___, 107 S.Ct. 1759 at 1778 (1987).

[4] *See* the discussion of McCleskey's *Massiah* claim *infra*.

[5] References to the transcripts of the July 8, July 9, and August 10, 1987 hearings will be to "I TR.," "II Tr.," and "III Tr.," respectively.

[6] Dissenting Justice White, joined by Clark and Harland, JJ., protested the new "constitutional rule . . . barring the use of evidence which is relevant, reliable and highly probative of the issue which the trial court has before it." 377 U.S. at 208. The dissenters were "unable to see how this case presents an unconstitutional interference with Massiah's right to counsel. Massiah was not prevented from consulting with counsel as often as he wished. No meetings with counsel were disturbed or spied upon. Preparation for trial was in no way obstructed. It is only a sterile syllogism – an unsound one, besides – to say that because Massiah had a right to counsel's aid before and during the trial, his out-of-court conversations and admissions must be excluded if obtained without counsel's consent or presence." *Id*. at 209.

The dissenters highlighted the incongruity of overturning Massiah's conviction of these facts. "Had there been no prior arrangements between [the confederate] and the police, had [the confederate] simply gone to the police after the conversation had occurred, his testimony relating Massiah's statements would be readily admissible at the trial, as would a recording which he might have made of the conversation. In such event, it would simply be said that Massiah risked talking to a friend who decided to disclose what he knew of Massiah's criminal activities. But if, as occurred here, [the confederate] had been cooperating with the police prior to his meeting with Massiah, both his evidence and the recorded conversation are somehow transformed into inadmissible evidence despite the fact that the hazard to Massiah remains precisely the same – the defection of a confederate in crime." *Id*. at 211.

[7] Justice Rehnquist, dissenting, questioned the validity of *Massiah*: "The exclusion of respondent's statements has no relationship whatsoever to the reliability of the evidence, and it rests on a prophylactic application of the Sixth Amendment right to counsel that in my view entirely ignores the doctrinal foundation of that right." 447 U.S. at 289. Echoing many of the concerns expressed by Justice White in *Massiah, id*. at 290, Justice Rehnquist argued that "there is no constitutional or historical support for concluding that an accused has a right to have his attorney serve as a sort of guru who must be present whenever an accused has an inclination to reveal incriminating information to anyone who acts to elicit such information at the behest of the prosecution." *Id*. at 295-96. Admitting that the informants in *Henry* and in *Massiah* were encouraged to elicit information from the respective defendants, Justice Rehnquist "doubt[ed] that most people would find this type of elicitation reprehensible." *Id*. at 297.

For criticism of *Henry* for extending *Massiah* "despite that decision's doctrinal emptiness" and for giving *Massiah* "a firmer place in the law than it deserves," see Salzburg, *Forward: The Flow and Ebb of Constitutional Criminal Procedure in the Warren and Burger Courts*, 69 Geo.L.J. 151, 206-08 (1980).

[8] There is some question whether Ben Wright's testimony on the fact of the murder would have been admissible at all absent corroboration by Evans' testimony. *See* O.C.G.A. §24-4-8 (uncorroborated testimony of an accomplice not sufficient to establish a fact). *But see McCleskey v. Kemp*, 753 F.2d at 885 (Wright's testimony corroborated by McCleskey's admitted participation in the robbery; corroboration need not extend to every material detail).

[9] Here, as in *Massiah* and Henry, the evidence is excluded and the conviction consequently reversed despite the fact that the evidence is "relevant, reliable and highly probative" of petitioner's guilt. *Massiah*, 377 U.S. at 208 (White, J., dissenting). There is no question that petitioner's incriminating statements to Evans were made voluntarily and without coercion. Had Evans been merely a good listener who first obtained McCleskey's confession and then approached the authorities, Evans' testimony would have been admissible. The substance

of the evidence would have been no different, McCleskey's risk in speaking would have been no different, and McCleskey's counsel would have been no less absent, but the evidence would have been admissible simply because the state did not intentionally seek to obtain it. While this court has grave doubts about the historical and rational validity of the Supreme Court's present interpretation of the sixth amendment, those doubts have been articulated ably in the dissents of Justice White and Justice Rehnquist. *See supra*, notes 4 and 5. Until the Supreme Court repudiates its present doctrine this court will be obliged to reach the result it reaches today.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

(Caption Omitted In Printing)

JUDGMENT

The Court, Honorable J. OWEN FORRESTER, United States District Judge, by order of this date, having GRANTING the petition for a writ of habeas corups, (sic) DIRECTING, the petitioner to re-try defendant within 120 days from receipt of the 12/23/87 order.

JUDGMENT is hereby entered in favor of the petitioner and against the respondent.

Dated at Atlanta, Georgia, this 15 day of January, 1988.

with permission of the court Nunc pro tunc for December 23, 1987.

LUTHER D. THOMAS, Clerk

By: illegible
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

(Caption Omitted In Printing)

ORDER

This matter is before the court on respondent's motion to reopen judgment. Fed. R. Civ. P. 60(b).

I. FACTS.

This petition for writ of habeas corpus was filed July 7, 1987. With the petition was a motion for stay of execution. This court granted the stay of execution verbally July 9, 1987, and in a formal order July 10, 1987. A two-day hearing was held on the petition for writ of habeas corpus July 8 and 9, 1987. The court continued the evidentiary hearing until August 10, 1987. On December 23, 1987 the court granted in part and denied in part the petition for writ of habeas corpus, and judgment was entered the same day. Respondent appealed, and petitioner cross-appealed. The judgment was stayed by the court March 9, 1988. The pending motion for relief from final judgment based on newly discovered evidence was filed May 6, 1988. The court entered an order allowing discovery until August 1, 1988 on the two issues of due diligence and of the previously unavailable witness, Offie Evans' knowledge.

Respondent seeks to reopen the December 1987 judgment based on the present availability of Offie Evans. Evans was a witness at petitioner's trial. The evidentiary hearings on the petition for writ of habeas corpus revealed that Evans had been moved purposely to a cell

adjacent to McCleskey's in order to elicit information from him. The court found that this was a violation of the *Massiah* doctrine. *See* Order, December 23, 1987. Evans did not testify at the evidentiary hearings on the habeas corpus petition.

Petitioner attempted to locate Mr. Evans during the July hearings in order for him to testify. An attorney working with petitioner's counsel made repeated phone calls to Offie Evans' sister looking for Mr. Evans. He was not able to reach Mr. Evans, but did get the address of another sister who he was supposedly staying with at the time. The attorney made repeated visits to the sister's house in order to try and find Mr. Evans. The attorney was told that Mr. Evans came by the residence every now and then but was not staying there. Stevenson Affidavit. Petitioner also hired an investigator, T. Delaney Bell, to help locate Mr. Evans. The investigator visited several addresses of both Mr. Evans and relatives, over a four-day period in June 1987. The investigator contacted family members again on July 6, 1987 and was told that they did not know where he was staying. Bell Aff. During the July 8th hearing the court noted that the federal marshal had tried to serve Mr. Evans at a sister's house but the sister did not know where he was. Respondent made no efforts to contact or locate Mr. Evans.

The respondent sent two letters to petitioner in the period between the July and August hearings to notify petitioner's counsel of the witnesses he would call in the August hearing. Both of those letters referred to the respondent's intent to re-call witnesses who had previously testified in the July hearings, but neither mentioned any desire or intention to call Mr. Evans as a witness. In

April 1988, counsel for respondent learned that Mr. Evans was in the Fulton County Jail on other charges. Respondent now seeks to set aside the judgment in order to take the testimony of Offie Evans.

II. CONCLUSIONS OF LAW.

Petitioner has moved this court to expand the record to include: discovery conducted pursuant to the court's order of June 17, 1988; Affidavits of Stevenson, Bell and Hashimi; Docket Sheet, *United States v. Offie Gene Evans*, No. 28027; Sentence, *Fulton Superior State Court v. Offie Evans*, No. A-16523 (May 15, 1973); and a newspaper clipping, *Atlanta Constitution*, December 24, 1987. Petitioner's two motions are unopposed, and for good cause shown petitioner's motion to expand the record, and second motion to expand the record are GRANTED.

Rule 60(b)[1] defines the circumstances under which a party may obtain relief from a final judgment. It should be construed in order to do substantial justice, but this does not mean that final judgment should be lightly reopened. The desirability for order and predictability in

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[1] Respondent's motion is based on Rule 60(b)(2) and (6). The rule says,

> On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons; . . . (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); . . . (6) any other reason justifying relief from the operation of the judgment.

the judicial process speaks for caution in the reopening of judgments. *Griffin v. Swim-Tech Corp.*, 722 F.2d 677 (11th Cir. 1984). The provisions of this rule must be carefully interpreted to preserve the delicate balance between the sanctity of final judgments and the "incessant command of the court's conscience that justice be done in light of *all* the facts." *Id.*, citing *Bankers Mortgage Company v. United States*, 423 F.2d 73, 77 (5th Cir.), *cert. denied*, 399 U.S. 927 (1970) (emphasis in original). Rule 60(b) motions are directed to the sound discretion of the district court. Because a motion for new trial under Rule 60(b) is an extraordinary motion, the requirements of the rule must be strictly met. *Seutieri v. Paige*, 808 F.2d 785 (11th Cir. 1987).

A. Rule 60(b)(2).

In order to succeed under 60(b)(2), a party must satisfy a five-part test: 1) the evidence must newly discovered since the trial; 2) due diligence on the part of the movant to discover the new evidence must be shown; 3) the evidence must not be merely cumulative or impeaching; 4) the evidence must be material; and 5) the evidence must be such that a new trial would probably produce a new result. *Seutieri*, 808 F.2d at 793; *see also, Taylor v. Texgas Corp.*, 831 F.2d 255 (11th Cir. 1987).

1. New discovered.

Offie Evans' identity has been known to the state since the initial trial. The respondent contends this is newly discovered evidence because Evans has not been able to testify about the question which became crucial in

this petition for habeas corpus; that is, the relationship between himself and the police, and whether he was directed by the authorities to elicit incriminating statements from McCleskey. Evans has given evidence at least three times in this case, in the original trial, the state habeas proceeding, and in his statement given in August 1978. Moreover, petitioner points out that in October 1981, Mr. Evans gave a deposition in the case of McCleskey's co-defendant, Bernard Depree. That deposition was filed in a federal habeas petition on behalf of Depree, in which the state was represented by respondent's present counsel. Petitioner contends that this deposition includes testimony about his contacts with the Atlanta Police while in the Fulton County Jail in 1978, and denials that he made police contacts until after he had spoken with Mr. McCleskey. Petitioner points out that the testimony in that deposition is contradictory to the testimony given in the deposition taken pursuant to this motion, but that the essentials are the same.

In light of the above discussion, it is apparent that Evans' testimony is not truly newly discovered but rather is merely newly produced. *See, Johnson Waste Materials v. Marshal,* 611 F.2d 593 (5th Cir. 1980) (checks and records which had been misplaced at time of trial were not newly discovered evidence sufficient to support 60(b)(2) motion). The fact that the essential substance of this testimony was in a previous deposition filed in the public records and known to respondent's counsel also indicates it is not newly discovered. *Seutieri,* 808 F.2d at 794 (evidence contained in public records at time of trial cannot be considered newly discovered evidence); *Taylor,* 831 F.2d at 255 (evidence cannot be newly discovered if in

possession of moving party or his attorney prior to entry of judgment). Where the movant was aware of a witness's identity and knowledge of the transaction, and chose not to track him down because of the expense, the evidence is not newly discovered because he was aware of the existence of the evidence before the trial. *Parrilla-Lopez v. United States,* 841 F.2d 16 (1st Cir. 1988). Similarly, in this case, the government was aware of the witness's existence, identity and relationship to the transaction but did not attempt to have him testify at trial. It is evident that Offie Evans' testimony is not truly newly discovered under the relevant authority.

2. Due Diligence.

In the June 17, 1988 order, the court noted that Respondent's "due diligence is measured by what the respondent knew at the time. That would include what the respondent knew about petitioner's effort to locate Offie Evans. That is not necessarily the sum total of his knowledge nor do the petitioner's efforts to locate Evans relieve him of any obligation to utilize resources available to him."

Respondent contends that though he did not make any efforts to track down Offie Evans during the summer of 1987, it was apparent from the activities of the petitioner that such actions would be futile.[2] Petitioner points

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[2] It appears that respondent's knowledge of petitioner's efforts to locate Evans came only from petitioner's counsel's statements at the evidentiary hearings.

out that the Atlanta Bureau of Police Services has enjoyed a special relationship with Mr. Evans over the years, and that if the department had been looking for him, Mr. Evans might have made himself available or with those larger resources could have been found. Petitioner especially points to the testimony of Assistant District Attorney Russ Parker that he had no information or leads as to Evans' location, but that he "could probably find him. [I have] spend enough time with him." I Tr. 174.

Discovery pursuant to this motion reveals that respondent made no efforts to locate Evans during the summer of 1987. *See*, Respondent's Answer to First Interrogatories of Petitioner, No. 1. Respondent now contends that the deposition of Evans shows that he was outside of Atlanta, and respondent would not have been able to locate him anyway. However, the affidavits of petitioner's assistants show that Evans' relatives had seen him at various times during petitioner's search for him. Therefore, it is unclear where exactly Mr. Evans was at the time and whether or not he could have been found. Moreover, it is not good enough merely to say that it would be impossible to find the evidence. Due diligence is measured by respondent's knowledge and actions. The standard under 60(b)(2) is that the movant exercise due diligence in order to find the relevant evidence before entry of judgment. Respondent relied on petitioner's actions in seeking Mr. Evans, but made no efforts of his own. As the court previously noted, petitioner's efforts did not relieve respondent of any obligation to utilize his own resources to locate Evans. Movant has not demonstrated the due diligence prong of the 60(b)(2) standard.

3. Evidence is Not Cumulative or Impeaching; Materiality.

Evans' deposition testimony essentially asserts that he was not moved intentionally to be placed next to McCleskey, and in fact was not moved at all, and was not an informant. His testimony goes directly to the issue involved, and therefore is material. However, there are numerous internal contradictions within the deposition, and contradictions with Evans' previous statements, or the statements of other witnesses. Also, it is clear that Mr. Evans has his own motives for denying his status as an informant. He expressed concern several times during his deposition about newspaper accounts which had labeled him an informant, because that kind of information could get a man killed. Evans Depo., p. 25.

4. Likelihood of Producing a Different Result.

It is unlikely Evans' testimony would produce a different result. The credibility or believability problems with his testimony are evident. He has a strong motivation for saying he was not an informant, not only because of recriminations from his associates, but also in order to stay in favor with the police and prosecutors who have used him to testify in the past. The numerous contradictions within his deposition also lead the court to the conclusion that his testimony would not be believable. *See* Petitioner's Brief in Response to Respondent's Supplement to Rule 60(b) Motion. In finding a *Massiah* violation, the court relied on the testimony of Officer Ulysses Worthy that someone requested his permission to move Evans to be near McCleskey, Order, December 23, 1987, p.

18, even in the face of other law enforcement personnel who denied requesting that Evans be moved or having any knowledge of such a request. Order, p. 19. The court relied on Worthy's testimony and noted that "[t]he lack of corroboration by other witnesses is not surprising; the other witnesses, like Assistant District Attorney Parker, had no reason to know of a request to move Evans or, like Detective Dorsey, had an obvious interest in concealing any such arrangement. Worthy, by contrast, had no apparent interest or bias that would explain any conscious deception." Order, p. 22. Therefore, Evans' testimony is not likely to change the credibility of Worthy's testimony or the fact that petitioner showed by a preponderance of the evidence that a *Massiah* violation occurred.

Therefore, for the above reasons, respondent's motion under 60(b)(2) is DENIED.

B. Rule 60(b)(6).

Rule 60(b)(6) grants federal courts broad authority to relieve a party from a final judgment "upon such terms as are just" provided the motion is made within a reasonable time and is not premised on one of the grounds in (b)(1) through (b)(5). *Liljeberg v. Health Services Acquisition Corp.*, ___ U.S. ___, 56 U.S.L.W. 4637, 4642 (1988). This ground should be applied only in exceptional circumstances. *Id*. The party seeking relief under 60(b)(6) has the burden of showing that absent such relief, an extreme and unexpected hardship will result. *Griffin*, 722 F.2d at 680. Respondent contends that in the unusual circumstances of this case, it would serve the ends of justice to reopen judgment under 60(b)(6). However, respondent

has shown no exceptional circumstances outside those discussed in the Rule 60(b)(2) motion. There is little likelihood that if this motion is denied an extreme hardship will result to respondent. Therefore, respondent's motion under Rule 60(b)(6) is DENIED.

III. CONCLUSION.

In sum, petitioner's two motions to expand record are GRANTED. Respondent's motion for relief from final judgment is DENIED.

SO ORDERED this 6th day of January, 1989.

/s/ J. Owen Forrester
J. OWEN FORRESTER
UNITED STATES DISTRICT JUDGE

United States Court of Appeals,
Eleventh Circuit.

Warren McCLESKEY,
Petitioner-Appellee,

v.

Walter ZANT, Superintendent, Georgia Diagnostic and Classification Center,
Respondent-Appellant.

Nos. 88-8085, 89-8085.

Nov. 22, 1989.

As Amended Dec. 13, 1989.

Appeals from the United States District Court for the Northern District of Georgia.

Before KRAVITCH and EDMONDSON, Circuit Judges, and RONEY, Senior Circuit Judge.

KRAVITCH, Circuit Judge:

This is a consolidated appeal by the State of Georgia from the district court's grant of Warren McCleskey's second petition for a writ of habeas corpus and from the district court's denial of the State's motion under Fed.R.Civ.P. 60(b) for relief from the judgment. The district court granted the writ solely on the basis of McCleskey's claim that his sixth amendment rights had been violated under *Massiah v. United States*, 377 U.S. 201, 84 S.Ct. 1199, 12 L.Ed.2d 246 (1964). Because we find that the district court abused its discretion in failing to dismiss McCleskey's *Massiah* allegation as an abuse of the writ, we reverse the district court without reaching the merits of McCleskey's *Massiah* claim or of the State's Rule 60(b) motion.

I. FACTS[1]

McCleskey was arrested and charged with the murder of a police officer during an armed robbery of the Dixie Furniture Store. The store was robbed by four men. Three entered through the back door and one through the front. Each of the four men was armed. McCleskey had a .38 caliber Rossi white-handled, nickel-plated pistol, Ben Wright had a sawed-off shotgun, and the other two had blue steel pistols. The man who entered through the front secured the store, forcing the employees to lie on the floor. The others rounded up the employees in the rear and began to tie them up with tape. The manager was forced at gunpoint to turn over the store receipts, his watch, and six dollars. Responding to a silent alarm, a police officer entered the store by the front door. He proceeded approximately fifteen feet down the center aisle. Two shots were fired. One shot struck the police officer in the head causing his death. The other shot glanced off a pocket lighter in the officer's pocket and lodged in a sofa. That bullet was recovered. The robbers fled. Sometime later, McCleskey was arrested in connection with another armed robbery.

McCleskey was identified by two of the store personnel as the robber who came in the front door. Shortly after his arrest, McCleskey confessed to participating in the robbery, but maintained that he was not the triggerman. One of his accomplices, Ben Wright, testified that McCleskey admitted to shooting the officer. Offie Evans,

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[1] The statement of facts is taken from the Georgia Supreme Court's opinion on direct appeal, *McCleskey v. The State*, 245 Ga. 108, 263 S.E.2d 146 (1980).

a jail inmate housed near McCleskey testified that McCleskey made a "jail house confession" in which he claimed he was the triggerman. The police officer was killed by a bullet fired from a .38 caliber Rossi handgun. Though the weapon was not recovered, McCleskey had stolen a .38 caliber Rossi in a holdup of a Red Dot grocery store two months earlier.

II. PRIOR PROCEEDINGS

The jury convicted McCleskey of murder and two counts of armed robbery. It sentenced McCleskey to death for the murder of the police officer and to consecutive life sentences for the two robbery counts. In 1980, these convictions and sentences were affirmed by the Georgia Supreme Court, *McCleskey v. State*, 245 Ga. 108, 263 S.E.2d 146, *cert. denied*, 449 U.S. 891, 101 S.Ct. 253, 66 L.Ed.2d 119 (1980). In January of 1981, McCleskey petitioned for habeas corpus relief in the Superior Court of Butts County, asserting over twenty challenges to his conviction and sentence. In an amendment to his petition, McCleskey alleged a *Massiah* violation, claiming that the introduction into evidence of statements he made to an informer violated his rights under the sixth amendment. *See Massiah v. United States*, 377 U.S. 201, 84 S.Ct. 1199. The petition was denied after an evidentiary hearing and the Georgia Supreme Court denied McCleskey's application for a certificate of probable cause to appeal. The United States Supreme Court denied McCleskey's petition for certiorari. *McCleskey v. Zant*, 454 U.S. 1093, 102 S.Ct. 659, 70 L.Ed.2d 631 (1981).

McCleskey filed his first federal habeas petition in district court in December of 1981, asserting eighteen grounds for granting the writ. That petition did *not* include a claim under *Massiah*. It did, however, include a claim under *Giglio v. United States*, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972), alleging that the state prosecutor had failed to reveal that Offie Evans, one of its witnesses, had been promised favorable treatment as a reward for his testimony. In 1984, the district court granted habeas corpus relief as to McCleskey's *Giglio* claim. It ordered that his conviction and sentence for malice murder be set aside, but affirmed his convictions and sentences for armed robbery. *McCleskey v. Zant*, 580 F.Supp. 338 (N.D.Ga. 1984).

Both parties appealed and in 1985, the Eleventh Circuit, sitting *en banc*, reversed the district court's grant of the writ on the *Giglio* claim and affirmed on all claims denied by the district court. *McCleskey v. Kemp*, 753 F.2d 877 (11th Cir.1985) (en banc). McCleskey then filed a petition for a writ of certiorari in the Supreme Court of the United States. The Supreme Court granted certiorari limited to consideration of the application of the Georgia death penalty and affirmed the Eleventh Circuit. *McCleskey v. Kemp*, 481 U.S. 279, 107 S.Ct. 1756, 95 L.Ed.2d 262, *petition for rehearing denied*, 482 U.S. 920, 107 S.Ct. 3199, 96 L.Ed.2d 686 (1987).

McCleskey filed a subsequent petition for a writ of habeas corpus in state court in June of 1987. In an amendment to that petition, McCleskey once again raised a *Massiah* claim, alleging that newly discovered evidence demonstrated that a jail inmate of McCleskey's was acting on behalf of the State as an informant. The state court

granted the State's motion to dismiss and the Georgia Supreme Court denied McCleskey's application for a certificate of probable cause.

McCleskey filed the present petition for a writ of habeas corpus in federal district court in July of 1987. After evidentiary hearings on the petition in July and August of 1987, the district court entered an order granting habeas corpus relief only as to McCleskey's murder conviction and sentence based upon the finding of a *Massiah* violation. *McCleskey v. Kemp*, No. C87-1517A (N.D.Ga. Dec. 23, 1987).

The State now appeals the district court's grant of the writ, claiming that the district court abused its discretion in failing to dismiss McCleskey's *Massiah* allegation as an abuse of the writ and that the district court erred in finding a violation of *Massiah*.[2]

III. ABUSE OF THE WRIT

A. *Background*

Under the doctrine of "abuse of the writ," a federal court may decline to entertain a second or subsequent habeas corpus petition that raises a claim that the petitioner did not raise in a prior petition. The doctrine is

[2] This court stayed the briefing schedule of the appeal pending the State's filing in district court of a motion under Fed.R.Civ.P. 60(b) for relief from the judgment based on the availability of witness Offie Evans. The district court denied the motion and this court granted the State's motion to consolidate the State's original appeal and its appeal from the denial of the motion for relief from the judgment.

grounded in the court's equitable power to decline to entertain a habeas corpus petition properly within its jurisdiction when "a suitor's conduct in relation to the matter at hand . . . disentitle[s] him to the relief he seeks." *Sanders v. United States*, 373 U.S. 1, 17, 83 S.Ct. 1068, 1078, 10 L.Ed.2d 148 (1963) (quoting *Fay v. Noia*, 372 U.S. 391, 438, 83 S.Ct. 822, 849, 9 L.Ed.2d 837 (1963)).

The statutory basis for the doctrine of abuse of the writ in cases of successive petitions for habeas corpus can be found at 28 U.S.C. § 2244(b)[3] and Rule 9(b) of the Rules Governing Section 2254 Cases in the United States District Courts.[4] These provisions address the problem of

[3] 28 U.S.C. § 2244(b) states as follows:

> When after an evidentiary hearing on the merits of a material factual issue, or after a hearing on the merits of an issue of law, a person in custody pursuant to the judgment of a State court has been denied by a court of the United States or a justice or judge of the United States release from custody or other remedy on an application for a writ of habeas corpus, a subsequent application for a writ of habeas corpus in behalf of such person need not be entertained by a court of the United States or a justice or judge of the United States unless the application alleges and is predicated on a factual or other ground not adjudicated on the hearing of the earlier application for the writ, and unless the court, justice, or judge is satisfied that the applicant has not on the earlier application deliberately withheld the newly asserted ground or otherwise abused the writ.

[4] Rule 9(b) provides as follows:

> **Successive Petitions.** A second or successive petition may be dismissed if the judge finds that it fails

(Continued on following page)

prisoners filing the same claims in successive petitions as well as the problem of prisoners who abuse the writ by filing their claims piecemeal. A "successive petition" is one that raises a claim already adjudicated through a prior petition, while a petition that raises grounds for relief not raised in the prior petition is analyzed as an "abuse of the writ." *See Gunn v. Newsome*, 881 F.2d 949, 955 n. 6 (11th Cir.1989) (en banc) (plurality opinion), *petition for cert. filed*, No. 89-611, 1989 WL 129621 (Oct. 16, 1989).

A federal court's decision to exercise its equitable power to dismiss a petition is based on different considerations in the two types of cases. In cases of successive petitions, equity usually will not permit a petitioner to reassert a claim resolved against him "in the hope of getting before a different judge in multijudge courts." *See* Sec. 2254 Cases R. 9 advisory committee's note. In cases of abuse of the writ, equity counsels against allowing "needless piecemeal litigation" or "collateral proceedings whose only purpose is to vex, harass, or delay." *Sanders*, 373 U.S. at 18, 83 S.Ct. at 1078. In both instances, the need for finality in criminal law counsels strongly against courts repeatedly reviewing criminal convictions. *See Kuhlmann v. Wilson*, 477 U.S. 436, 452-53, 106 S.Ct. 2616, 2626-27, 91 L.Ed.2d 364 (1986) (plurality opinion).

(Continued from previous page)

to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ.

The state has the burden of pleading that the habeas petitioner has abused the writ. *Price v. Johnston*, 334 U.S. 266, 291-92, 68 S.Ct. 1049, 1063, 92 L.Ed. 1356 (1948). This circuit has held that "[t]he state carries its burden by recounting the petitioner's writ history, identifying the claims not raised before the instant petition and alleging that the petitioner abused the writ in violation of 28 U.S.C. § 2254, Rule 9(b)." *Booker v. Wainwright*, 764 F.2d 1371, 1376 (11th Cir.1985), *cert. denied*, 474 U.S. 975, 106 S.Ct. 339, 88 L.Ed.2d 324 (1985). The State has clearly met its burden here, as it is evident that McCleskey did not assert his *Massiah* claim in his first federal habeas petition.

McCleskey's previous failure to assert the claim does not, however, require the federal court to dismiss his petition, for the courts have recognized that "not all piecemeal litigation is needless." *Booker v. Wainwright, id.; see also Haley v. Estelle*, 632 F.2d 1273, 1276 (5th Cir.1980).[5] Once the state has alleged abuse of the writ, the petitioner must be afforded the opportunity to justify his previous failure to raise the claim. In deciding whether a petitioner has presented sufficient justification, courts have required the petitioner to show that he did not deliberately abandon the claim and that his failure to raise it was not due to inexcusable neglect. *See Woodward v. Hutchins*, 464 U.S. 377, 379, 104 S.Ct. 752, 753, 78 L.Ed.2d 541 (1984) (per curiam) (Powell, J., concurring,

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[5] In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir.1981) (en banc), this court adopted as binding precedent all decisions of the former Fifth Circuit handed down before October 1, 1981.

joined by four other justices); *Demps v. Dugger*, 874 F.2d 1385, 1391 (11th Cir.1989), *petition for cert. filed*, No. 89-5277, 1989 WL 113448 (Aug. 4, 1989); *Witt v. Wainwright*, 755 F.2d 1396, 1397 (11th Cir.), *cert. denied*, 470 U.S. 1039, 105 S.Ct. 1415, 84 L.Ed.2d 801 (1985); *Potts v. Zant*, 638 F.2d 727,740-41 (5th Cir. Unit B 1981), *cert. denied*, 454 U.S. 877, 102 S.Ct. 357, 70 L.Ed.2d 187 (1981).[6] If a court determines that the petitioner has filed to carry his burden of disproving an abuse of the writ, it may dismiss the petition unless the ends of justice demand that the court reach the merits. *Sanders*, 373 U.S. at 16-19, 83 S.Ct. at 1078-79; *Demps v. Dugger*, 874 F.2d at 1391; *Davis v. Kemp*, 829 F.2d 1522, 1526 (11th Cir.1987), *cert. denied*, ___ U.S. ___, 108 S.Ct. 1099, 99 L.Ed.2d 262 (1988).

Whether a second or subsequent petition is to be dismissed on abuse of the writ grounds is left to the sound discretion of the district court. *Sanders*, 373 U.S at 18, 83 S.Ct. at 1079; *Darden v. Dugger*, 825 F.2d 287, 294 (11th Cir.1987), *cert. denied*, ___ U.S. ___, 108 S.Ct. 1125, 99 L.Ed.2d 285 (1988); *Potts v. Zant*, 638 F.2d at 741. Yet discretion in such matters is not unfettered, and its sound exercise will rarely permit a district court to hear a petition that clearly constitutes an abuse of the writ. *See Gunn v. Newsome*, 881 F.2d at 949.

In the instant appeal, the district court found that McCleskey could not be said to have intentionally abandoned his claim. We disagree and find that the district

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[6] In *Stein v. Reynolds Securities, Inc.*, 667 F.2d 33 (11th Cir.1982), this court adopted as binding precedent all decisions of Unit B of the former Fifth Circuit handed down after September 30, 1981.

court abused its discretion in failing to dismiss a clearly abusive petition.

B. *Deliberate Abandonment of the Massiah Claim*

McCleskey asserts that his failure to raise a *Massiah* claim in his earlier federal petition is justified because at the time he filed that petition, he lacked the evidence to support such a claim. To demonstrate a violation of sixth amendment rights under *Massiah v. United States*, 377 U.S. 201, 84 S.Ct. 1199, a defendant must show that the prosecution deliberately elicited incriminating statements from him in the absence of his lawyer. *Massiah* itself involved statements made by a defendant free on bail to a co-indictee in a car that had been wired by the government. In *United States v. Henry*, 447 U.S. 264, 100 S.Ct. 2183, 65 L.Ed.2d 115 (1980), the Supreme Court applied *Massiah* to a situation in which incriminatory statements were made to a cellmate who was a government informant. In *Kuhlmann v. Wilson*, the Supreme Court stressed that a defendant alleging a *Massiah* violation "must demonstrate that the police and their informant took some action, beyond merely listening, that was designed deliberately to elicit incriminating remarks." 477 U.S. at 459, 106 S.Ct. at 2630.[7]

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[7] In *Lightbourne v. Dugger*, 829 F.2d 1012 (11th Cir.1987), *cert. denied*, ___ U.S. ___, 109 S.Ct. 329, 102 L.Ed.2d 346 (1988), this circuit characterized petitioner's burden in a *Massiah/Henry* claim as one involving two elements: "In order to establish a violation of the Sixth Amendment in a jailhouse informant case, the accused must show (1) that a fellow inmate was a government agent; and (2) that the inmate deliberately elicited incriminating statements from the accused." *Id.* at 1020.

McCleskey bases his *Massiah* claim on two pieces of evidence. The first is a 21-page written statement of Offie Evans, a prisoner who was incarcerated in the cell next to McCleskey's when McCleskey was in the Fulton County Jail awaiting trial. Evans testified against McCleskey at trial, relating several incriminating statements made by McCleskey. The written statement, which had been given to the Atlanta Police Department in August of 1978, sets out these conversations in great detail, demonstrating that Evans lied to McCleskey in order to get information from him.[8] McCleskey argues that the written statement shows evidence of an *ab initio* relationship between Evans and the prosecution and is thus highly relevant to his *Massiah* claim.

The second piece of evidence McCleskey uses to support his *Massiah* claim is the testimony of Ulysses Worthy who was captain of the day watch at the Fulton County Jail during the summer of 1978. Worthy testified at two separate points during the district court hearings on McCleskey's second habeas petition. Though Worthy's testimony was at times confused and contradictory, the district court credited Worthy's assertion that at some point some officer involved with the case had asked that Evans be moved to a different cell. The district court judge relied heavily on Worthy's testimony in holding that McCleskey had presented a valid *Massiah* claim. In fact, he found that "[t]he lack of corroboration by other

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[8] For instance, Evans told McCleskey that his name was Charles, that he was the uncle of codefendant Ben Wright, and that he was supposed to be a participant in the robbery himself.

witnesses is not surprising; the other witnesses, like Assistant District Attorney Parker, had no reason to know of a request to move Evans or, like Detective Dorsey, had an obvious interest in concealing any such arrangement. Worthy, by contrast, had no apparent interest or bias that would explain any conscious deception." *McCleskey*, No. C87-1517A, slip op. at 22.

McCleskey maintains that he was unaware of both pieces of evidence critical to his *Massiah* claim until well after he filed his first federal habeas petition. It is uncontested that he did not obtain Evans' statement until July of 1987 and that he did not know about the existence of Worthy until the time of the hearing on the second federal habeas petition. The State strongly contends that habeas counsel realized or should have realized that Evans had made a written statement concerning his conversations with McCleskey and asserts that petitioner's counsel should have made some effort to obtain that statement. The district court found, however, that McCleskey was not in fact aware of the written statement, and we cannot say that this determination is clearly erroneous.

Assuming that McCleskey was unaware of both pieces of evidence, the question before us is whether McCleskey's unawareness of the *factual* bases for his *Massiah* claim at the time of his first federal habeas petition is sufficient to justify his failure to present the claim. The district court found that it was sufficient, holding that McCleskey's unawareness precluded a finding of deliberate abandonment of the claim, despite the fact that McCleskey had raised it in his first state habeas petition. We disagree.

In finding that McCleskey did not deliberately abandon his *Massiah* claim, the district court stated that:

> First petitioner cannot be said to have intentionally abandoned this claim. Although petitioner did raise a *Massiah* claim in his first state petition, that claim was dropped because it was obvious that it could not succeed given the then-known facts. At the time of his first federal petition, petitioner was unaware of Evans' written statement, which, as noted above, contains strong indications of an *ab initio* relationship between Evans and the authorities. Abandoning a claim whose supporting facts only later become evident is not an abandonment that "for strategic, tactical, or any other reasons . . . can be described as the deliberate by-passing of state procedures." . . . Petitioner's *Massiah* claim is therefore not an abuse of the writ on which no evidence should have been taken. This is not a case where petitioner has reserved his proof or deliberately withheld his claim for a second petition. . . . Nor is the petitioner now raising an issue identical to one he earlier considered without merit.

McCleskey, No. C87-1517A, slip op. at 24 (citations omitted).

This holding by the district court misconstrues the meaning of deliberate abandonment. McCleskey included a *Massiah* claim in his first state petition, dropped it in his first federal petition, and now asserts it again in his second federal petition.[9] Given that McCleskey had

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[9] In an amendment to his first state petition, McCleskey alleged that:

(Continued on following page)

asserted the *Massiah* claim in his first state habeas petition, it is clear that the issue was not unknown to him at the time of his first federal petition. Further, we must assume that at the time McCleskey filed his first state habeas petition, counsel had determined that there was some factual basis for a *Massiah* claim. Indeed, such a determination is not surprising. Not only was counsel aware that Evans was in a cell next to McCleskey,[10] but counsel was also aware that some sort of relationship existed between Evans and the police, as this formed the basis of McCleskey's *Giglio* claim.[11] The petitioner and his counsel did not accidentally fail to include the *Massiah* claim in the federal petition, but made a knowing choice not to pursue the claim after having raised it previously. This constitutes prima facie evidence of deliberate abandonment. In *Darden v. Dugger*, we stated that:

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> The introduction into evidence of petitioner's statements to an informer, elicited in a situation created to induce the petitioner to make incriminating statements without assistance of counsel, violated the petitioner's right to counsel under the Sixth Amendment to the Constitution of the United States and Section 2-111 of the 1976 Constitution of the State of Georgia.

[10] Evans testified at trial as to certain statements that McCleskey had made in prison.

[11] In *Giglio v. United States*, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972), the Supreme Court held that the state violates due process when it obtains a conviction on the basis of a witness's testimony when the witness has failed to disclose a promise of favorable treatment from the prosecution. McCleskey included a *Giglio* claim in his first state and first federal habeas petitions.

> The record shows that the issue presented in this third petition was specifically withdrawn from the district court's consideration as being not well founded. The issue was abandoned. Intentional abandonment of a claim is precisely the context that application of the concept of abuse of the writ is intended to address. *Witt*, 755 F.2d at 1397. Petitioner may be deemed to have waived his right to a hearing on a successive application for federal habeas relief when he deliberately abandons one of his grounds at the first hearing.

825 F.2d at 294.

When asked at the second federal habeas hearing why he did not pursue the *Massiah* claim in his first federal petition, counsel responded that his efforts to find evidence in support of the claim had failed. It appears, however, that these efforts were somewhat lacking. Counsel testified that he informally attempted to contact jailers at the Fulton County Jail, but that they could provide him with no information.[12] He also noted that at

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[12] At his second federal habeas hearing, the lawyer who represented McCleskey at the first federal habeas hearing testified that he "spoke with a couple of Atlanta Bureau of Police Services Officers" in order to find out how to develop factual evidence in support of a claim. Pursuant to their suggestion, counsel spoke with two or three persons who were deputies at the Fulton County Jail. He testified that "none of them had any information. Basically they had no recollection of the circumstances regarding how Evans came to be assigned to the jail cell that he was assigned to or of any conversations with the Atlanta Bureau of Police Services Detectives regarding Offie Evans' assignment to that jail cell."

Counsel apparently made no attempt to contact persons who clearly had contact with Evans and McCleskey at the

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a deposition taken for the first state habeas hearing, Russell Parker, the District Attorney prosecuting the case, claimed that he was unaware of any instance in which Evans had worked for the Atlanta Police Department prior to his overhearing conversations at the Fulton County Jail. Counsel testified that he did not carry the *Massiah* claim over into the federal habeas petition because he "looked at what we had been able to develop in support of the claim factually in the state habeas proceeding and made the judgment that we didn't have the facts to support the claim and, therefore, did not bring it into federal court."

Abandoning a claim after initial investigatory efforts prove unsuccessful cannot insulate a petitioner from abuse of the writ. *See Witt v. Wainwright*, 755 F.2d at 1397 (insufficient to allege that evidence was not available if it was within petitioner's power to elicit such evidence at time of earlier petition); *Woodard v. Hutchins*, 464 U.S. 377, 379 & n. 3, 104 S.Ct. 752, 753 & n. 3, 78 L.Ed.2d 541 (1984) (per curiam) (Powell, J., concurring, joined by four other justices) (petitioner found to have abused the writ when he is unable to explain why examination providing evidence of insanity was not conducted earlier); *Antone v. Dugger*, 465 U.S. 200, 205 & n. 3, 206, 104 S.Ct. 962, 964 & n. 3, 965, 79 L.Ed.2d 147 (1984) (per curiam) (haste with

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Fulton County Jail. He testified that he did not speak to Detective Dorsey (mentioned by Evans in his testimony at the first state habeas hearing), to Detectives Jowers or Harris (officers who had investigated the McCleskey case), or Deputy Hamilton (who testified at trial regarding his contact with Mr. Evans).

which first habeas petition prepared does not require courts to consider claims withheld from that petition if substance could have been presented in first petition).

McCleskey places great emphasis on the fact that the State allegedly withheld Evans' 21-page statement from both trial and habeas counsel. The statement was ultimately obtained in June of 1987 through a request pursuant to the Georgia Open Records Act, O.C.G.A. § 50-18-72(a). It is clear, however, that the statement itself does not demonstrate the existence of a *Massiah* violation. At most, it was simply the catalyst that caused counsel to pursue the *Massiah* claim more vigorously. The key piece of evidence supporting McCleskey's *Massiah* claim was the testimony of Worthy, who testified for the first time at the second federal habeas hearing in July of 1987. Counsel claims that he did not discover Worthy until he engaged in a "massive, indiscriminate effort to subpoena everyone whose name was mentioned in any document." McCleskey has not presented any reason why counsel would have been unable to contact Ulysses Worthy back in 1981 when the first federal habeas petition was filed. Nor has he shown that a more extensive effort at that time to track down persons with information as to what transpired in the county jail during the summer of 1978 would not have turned up Worthy. A petitioner and his counsel may not circumvent the abuse of the writ doctrine by failing to follow through with an investigation and then later asserting that the claim could not have succeeded earlier on the facts as then known. It will only be possible to avoid piecemeal litigation if counsel is

required to make a thorough investigation of the facts at the time of petitioner's first petition for habeas corpus.[13]

C. *Ends of Justice*

Having found that McCleskey abused the writ by deliberately abandoning his *Massiah* claim, we must now decide whether the "ends of justice" require consideration of his claim on the merits.[14] *Sanders v. United States*, 373 U.S. at 16-19, 83 S.Ct. at 1078-79. In *Kuhlmann v. Wilson*, the Supreme Court attempted to give greater content to the open-ended "ends of justice" inquiry. Its statement, however, that "the 'ends of justice' require federal courts to entertain such petitions only where petitioner supplements his constitutional claim with a colorable showing of factual innocence," 477 U.S. at 454, 106 S.Ct. at 2627, commanded only a plurality of the justices. *See Messer v. Kemp*, 831 F.2d 946, 958 n. 19 (11th Cir.1987) (en banc), *cert. denied*, ___ U.S. ___, 108 S.Ct. 1586, 99 L.Ed.2d 902 (1988). Thus, the circumstances under which ends of justice would require rehearing of an otherwise abusive petition remain unparticularized.

We find it unnecessary to more narrowly define the circumstances in this case. For, the instances in which

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[13] We also note that in 1981 there apparently still existed records listing each prisoner's cell assignment and any visitation of prisoners by outsiders. These records, which would have corroborated or disproved Worthy's testimony, have since been destroyed.

[14] The district court did not reach the "ends of justice" inquiry as it found that McCleskey's claim did not constitute abuse of the writ.

ends of justice would require a rehearing of a claim do not include those in which a violation of a constitutional right would be found to constitute harmless error.[15] The members of this panel disagree as to whether the district court was correct in finding that McCleskey had established a *Massiah* violation. Pretermitting that inquiry, however, the panel is unanimous that any violation that may have occurred would constitute harmless error and that the district court erred in concluding otherwise.

D. *Harmless Error*

The remedy for a *Massiah* violation is not an automatic reversal of a conviction, but rather the exclusion of evidence tainted by the violation of petitioner's right to counsel. *United States v. Morrison*, 449 U.S. 361, 365, 101 S.Ct. 665, 668, 66 L.Ed.2d 564 (1981). The previous use of the tainted evidence will not result in a reversal of a conviction if it constituted "harmless error." Under the harmless error doctrine, the state must "prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 828, 17 L.Ed.2d 705 (1967). *See also, Satterwhite v. Texas*, 486 U.S. 249, 108 S.Ct. 1792, 1798, 100 L.Ed.2d 284 (1988) (harmless error analysis

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[15] *See Messer v. Kemp*, 831 F.2d at 958-59:

> Because we conclude, as a matter of law, that the record in this case fails to disclose an *Ake* violation our "ends of justice" analysis need not proceed any further. That is, we need not address any other factors relevant to the "ends of justice" in light of our conclusion that no constitutional violation occurred.

applied to sixth amendment violation tainting evidence in sentencing phase of capital trial); *Brown v. Dugger*, 831 F.2d 1547, 1554 (11th Cir.1987).

In this case, the district court held that the error complained of could not be found harmless because Evans' testimony concerning McCleskey's incriminating statements was critical to the State's case. In reaching this conclusion, the court ignored the Eleventh Circuit's previous discussion in *McCleskey*, 753 F.2d at 884-85, of the importance of the evidence introduced through Evans' testimony at trial. Though that discussion occurred in the context of McCleskey's *Giglio* claim, it clearly has bearing on the import of Evans' testimony in the context of McCleskey's *Massiah* claim. It is true, as petitioner argues, that the harmless error inquiry in the case of a *Giglio* claim differs from the inquiry in the case of a *Massiah* violation, but this difference does not save McCleskey's claim.

The crucial question in a *Giglio* claim is whether the state's failure to disclose its promise of reward to a witness affected the judgment of the jury as to the credibility of that witness. *See Giglio*, 405 U.S. at 154, 92 S.Ct. at 766. In its previous opinion, the Eleventh Circuit held that the judgment of the jury that convicted McCleskey was not affected by the lack of disclosure. Its holding was based on two separate grounds. First, it found that "Evans' credibility was exposed to substantial impeachment even without the detective's statement and the inconsistent description of his escape," as the jury had already been made aware of Evans' extensive list of past convictions. 753 F.2d at 884. Second, and more important for our purposes, the Eleventh Circuit found that, in light of all

the other evidence presented to the jury, Evans' testimony could not " 'in any reasonable likelihood have affected the judgment of the jury.' " *Id.* at 885 (quoting *Napue v. Illinois*, 360 U.S. 264, 271, 79 S.Ct. 1173, 1178, 3 L.Ed.2d 1217 (1959)). This is precisely the finding that must be made in a harmless error analysis under *Massiah* and upon reexamination, we find no reason to disturb this finding.

Evans was called by the State on rebuttal to strengthen its proof that McCleskey was the triggerman at the holdup. He testified that McCleskey had admitted to him that he had shot the policeman and that McCleskey had admitted to wearing makeup to disguise himself during the robbery. He also stated that McCleskey said he would have shot his way out even if there had been a dozen policemen.

Turning first to Evans' testimony regarding McCleskey's admission that he was the triggerman, we feel that the State has met its burden of proving, beyond a reasonable doubt, that this testimony did not contribute to the verdict. First, as noted by the en banc court, McCleskey's codefendant, Ben Wright also testified that McCleskey was the triggerman. Though Georgia law requires corroboration of an accomplice's testimony in felony cases, it is clear that corroboration can be through circumstantial as well as direct evidence. *Davis v. State*, 178 Ga.App. 760, 344 S.E.2d 730, 732 (Ga.App.1986) (quoting *Gunter v. State*, 243 Ga. 651, 655, 256 S.E.2d 341 (Ga.1979)).

The State presented a substantial amount of circumstantial evidence. McCleskey himself confessed to his

participation in the robbery. The officer was killed by the man who entered and secured the front of the store while the other three men were in the back. McCleskey was identified by two of the store personnel as the robber who came in the front door. The officer was killed by a bullet from a .38 caliber Rossi handgun. The State presented evidence that McCleskey had stolen a .38 caliber Rossi in a previous holdup. The gun that McCleskey had stolen had a white handle. The State presented testimony from an eyewitness that the robber who ran out the front door after the robbery was carrying a pearl-handled pistol. This evidence not only corroborates Ben Wright's testimony, but is of sufficient quantity to allow this court to find that any additional testimony by Evans did not contribute to the verdict.

Evans' testimony regarding McCleskey's statement that he was wearing makeup could also not have reasonably affected the jury's determination. The en banc court found that:

> Evans' testimony that McCleskey had made up his face corroborated the identification testimony of one of the eyewitnesses. Nevertheless, this evidence was not crucial to the State's case. That McCleskey was wearing makeup helps establish he was the robber who entered the furniture store through the front door. This fact had already been directly testified to by McCleskey's accomplice and two eyewitnesses as well as corroborated by McCleskey's own confession. That Evans' testimony buttresses one of the eyewitnesses' identifications is relatively unimportant.

753 F.2d at 885.

Finally, petitioner asserts that Evans' testimony as to McCleskey's statement that he would have been willing to shoot twelve policemen affected the jury's finding as to the presence of malice and increased its willingness to impose a sentence of death. Once again, we find that the en banc court's analysis of this issue demonstrates that this testimony was not crucial to the jury's finding of malice murder. The court wrote that:

> In his closing argument, however, the prosecutor presented to the jury three reasons supporting a conviction for malice murder. First, he argued that the physical evidence showed malicious intent because it indicated that McCleskey shot the police officer once in the head and a second time in the chest as he lay dying on the floor. Second, the prosecutor asserted that McCleskey had a choice, either to surrender or to kill the officer. That he chose to kill indicated malice. Third, the prosecutor contended that McCleskey's statement to Evans that he still would have shot his way out if there had been twelve police officers showed malice. This statement by McCleskey was not developed at length during Evans' testimony and was mentioned only in passing by the prosecutor in closing argument.

Id. at 885. In addition, the court finds no reasonable likelihood that the jury's imposition of the death penalty was affected by Evans' testimony. The prosecutor did not introduce Evans as a witness at the sentencing phase of trial, nor did he use Evans' testimony to portray McCleskey as a hardened criminal deserving of death, but concentrated instead on McCleskey's prior convictions.[16]

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[16] This case can easily be distinguished from *Satterwhite v. Texas*, 486 U.S. 249, 108 S.Ct. 1792, 100 L.Ed.2d 284 (1988), a

(Continued on following page)

Because evidence other than Evans' testimony presented in the case presents such a clear indication of McCleskey's guilt, this court finds beyond a reasonable doubt that the jury would have convicted and sentenced McCleskey as it did even without Evans' testimony. Our determination that any *Massiah* error would be harmless precludes a finding that the ends of justice would require us to entertain McCleskey's claim on the merits.

CONCLUSION

The judgment of the district court granting the petition for writ of habeas corpus is reversed and the petition is hereby denied as an abuse of the writ.

REVERSED.

(Continued from previous page)

case that petitioner cites as controlling. In *Satterwhite*, a psychiatrist, who had interviewed the defendant in violation of his sixth amendment rights, testified in a separate sentencing proceeding that the defendant presented a threat to society through continuing acts of violence. In finding that the constitutional error was not harmless, the Court stressed that under Texas law, a jury may not sentence a defendant to death unless it finds that the defendant would commit acts of violence and would be a threat to society. Additionally, the Court found that the psychiatrist's testimony stood out "both because of his qualifications as a medical doctor specializing in psychiatry and because of the powerful content of his message." *Id.* at ___, 108 S.Ct. at 1799. In the instant case, the jury was not instructed as to future dangerousness, and the Eleventh Circuit found, in its previous discussion of the *Giglio* violation, that Evans' testimony had already been greatly impeached by his own criminal background. 753 F.2d at 884.

Supreme Court of the United States

No. 89-7024

Warren McCleskey,

Petitioner

v.

Walter D. Zant, Superintendent, Georgia Diagnostic & Classification Center

ON PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Eleventh Circuit.

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. In addition to the questions presented, the parties are requested to brief and argue the following question:

> "Must the State demonstrate that a claim was deliberately abandoned in an earlier petition for a writ of habeas corpus in order to establish that inclusion of that claim in a subsequent habeas petition constitutes abuse of the writ?"

June 4, 1990

FILED
JUL 30 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-7024 (6)

In The

Supreme Court of the United States

October Term, 1990

WARREN McCLESKEY,

Petitioner,

vs.

WALTER D. ZANT, Superintendent,
Georgia Diagnostic & Classification Center,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Should a State, which has been proven (i) to have committed a constitutional violation in a criminal case and (ii) to have deliberately hidden that violation for ten years through a pattern of secrecy and deception, be permitted to assert "abuse of the writ" as a defense to a second federal habeas application – on the ground that the applicant should have discovered the State's misconduct, and its deliberate cover-up, sooner?

2. Should a habeas applicant be deemed to have "deliberately abandoned" a constitutional claim of State misconduct when, after a "reasonably competent" investigation, he was unable to uncover facts either proving the misconduct or revealing the conspiracy by which the State misconduct was being hidden?

3. Must the State demonstrate that a claim was deliberately abandoned in an earlier petition for a writ of habeas corpus in order to establish that inclusion of that claim in a subsequent habeas petition constitutes abuse of the writ?

4. Should a Court of Appeals, in determining whether a State's constitutional violation was harmless error, be permitted under Rule 52(a) of the Fed. R. Civ. P. to disregard the express findings of fact, on the harmless error issue, that were made by the District Court below?

5. Was the State's introduction of an unconstitutionally obtained confession – which was the only item of direct testimony, by an apparently impartial witness, identifying the defendant as the triggerman in a homicide – harmless constitutional error, both as to guilt and as to penalty, in this capital case?

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CITATIONS TO OPINIONS BELOW

An opinion of the District Court granting judgment in petitioner's favor is reported at 580 F. Supp. 338 (N.D. Ga. 1984). The Court of Appeals reversed that judgment at 753 F.2d 877 (11th Cir. 1987) (en banc), and this Court affirmed at 481 U.S. 279 (1987).

On a second federal habeas petition, the District Court entered an order and a formal judgment on January 15, 1988, nunc pro tunc for December 23, 1987, granting petitioner relief; that order, which is not officially reported, appears in the Joint Appendix ("J.A.") at pages 63-100. On January 6, 1989, the District Court entered an order denying respondent's motion to alter or amend the judgment under Rule 60(b); that opinion, also unreported, appears at J.A. 102-111.

A panel of the Court of Appeals reversed the judgment of the District Court and denied relief on November 22, 1989; that opinion, which is reported at 890 F.2d 342 (11th Cir. 1989), appears at J.A. 112-135.

JURISDICTION

A timely petition for rehearing and rehearing en banc was denied by the Court of Appeals on February 6, 1990. See Appendix D to the petition for certiorari. The Court of Appeals stayed its mandate to and including March 23, 1990, pending the timely filing of a petition for certiorari. See Appendix E to the petition for certiorari. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves 28 U.S.C. § 2244(b), which provides in pertinent part:

> When after an evidentiary hearing on the merits of a material factual issue, or after a hearing on the merits of an issue of law, a person in custody pursuant to the judgment of a State court has been denied by a court of the United States . . . release from custody or other remedy on an application for a writ of habeas corpus, a subsequent application

> for a writ of habeas corpus in behalf of such person need not be entertained by a court of the United States . . . unless the application alleges and is predicated on a factual or other ground not adjudicated on the hearing of the earlier application for the writ, and unless the court . . . is satisfied that the applicant has not on the earlier application deliberately withheld the newly asserted ground or otherwise abused the writ.

This case also involves Rule 9(b) of the Rules Governing Section 2254 Cases in the United States District Courts, which provides:

> ***Successive petitions***. A second or successive petition may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ.

STATEMENT OF THE CASE

I. STATEMENT OF FACTS

A. The Crime

On May 13, 1978, the Dixie Furniture Store in Atlanta, Georgia, was robbed by four men (T. Tr. 360-363), each of them carrying weapons. (T. Tr. 199; 266-268).[1] During the

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[1] Each reference to the transcript of the trial of this case, held in the Superior Court of Fulton County, Georgia, on October 9-12, 1978, will be indicated by the abbreviation "T. Tr.," followed by the number of the page on which the reference may be found. References to the transcript of the state habeas corpus proceedings, held in the Superior Court of Butts County, Georgia, on January 30, 1981, will be indicated by the abbreviation "St. Hab. Tr." References to the transcript of the federal habeas corpus hearing, held in the United States District Court for the Northern District of Georgia on July 8 & 9, and August 10, 1987, will be indicated by the abbreviation "R." followed by numbers indicating the volume of the record and the page number (*e.g.* R4- 1), on which the reference may be found.

robbery, an Atlanta police officer, Frank Schlatt, entered the front of the furniture store in answer to a silent alarm; he was shot and mortally wounded by one of the robbers. (T. Tr. 213; 330-332). Within a month of the crime, three of the four men, including petitioner Warren McCleskey, were taken into police custody. (T. Tr. 349-350; 426-427; see 582). On May 31st, shortly after his May 30th arrest, Mr. McCleskey gave a written statement to police (T. Tr. 178) in which he acknowledged taking part in the robbery but denied shooting Officer Schlatt. (T. Tr. 510-513).

Although several furniture store employees and other persons were present when the robbery began, all had been shunted to offices toward the rear of the store and ordered "to lay down on the floor and close [their] . . . eyes." (T. Tr. 214; 200; 291; 339). Consequently, while some employees testified that they heard footsteps moving forward just before the shots were fired, neither they nor anyone else could tell police which robber had confronted and shot Officer Schlatt. (T. Tr. 200; 214-216; 292-293; 341-343; 330-332). As the District Court subsequently found, "[t]here were no witnesses to the shooting." (J.A. 89).[2]

B. The *Massiah* Violation

After his arrest on May 30th, Mr. McCleskey was placed in solitary confinement at the Fulton County Jail, awaiting trial. The District Court found that approximately one month later, in early July of 1978, officers of the Atlanta Bureau of Police Services colluded with an inmate, Offie Evans – who had just been arrested and taken to the Fulton County Jail on unrelated charges (J.A. 90) – in order to secure a confession that would identify Mr. McCleskey as the robber who had shot Officer Schlatt.

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[2] Police gathered several items of physical evidence which directly tied one or more of the robbers to the crime. For example, co-defendant Ben Wright left a black leather coat which was recovered at the scene. Photographs of the coat were introduced during petitioner's trial. (T. Tr. 370-372; 442-443; 650-654).

The District Court, after three days of evidentiary hearings, found that "one or more of those [who were] investigating Officer Schlatt's murder" (J.A. 90) requested Captain Ulysses Worthy, a supervisory jailor at the Fulton County Jail, to move informant Evans from another cell to the cell adjacent to Mr. McCleskey. (J.A. 82). Next, the officers instructed informant Evans to "get some information" from Mr. McCleskey about Officer Schlatt's homicide (J.A. 78):

> [Evans] was moved, pursuant to a request approved by Worthy, to the adjoining cell for the purpose of gathering incriminating information; Evans was probably coached in how to approach McCleskey and given critical facts unknown to the general public; Evans engaged McCleskey in conversation and eavesdropped on McCleskey's conversations with [co-defendant Bernard] DuPree; and Evans reported what he had heard . . . to Assistant District Attorney Parker. . . .

(J.A. 83).

In making these findings, the District Court credited the testimony of jailor Worthy, who recounted how Atlanta police detectives and informant Evans met in Worthy's office at the jail to plan the secret interrogation. Jailor Worthy testified that, during the meeting, Detective Sidney Dorsey (or perhaps another "officer on the case") "asked Mr. Evans to engage in conversations with McCleskey who was being held in the jail." (R5-150). The District Court itself questioned jailor Worthy on the essential points:

THE COURT:	But you're satisfied that those three things happened, that they asked to have him put next to McCleskey, that they asked him to overhear McCleskey, and that they asked him to question McCleskey.
THE WITNESS:	I was asked can – to be placed near McCleskey's cell, I was asked.
THE COURT:	And you're satisfied that Evans was asked to overhear

	McCleskey talk about this case?
THE WITNESS:	Yes, sir.
THE COURT:	And that he was asked to kind of try to draw him out a little bit about it?
THE WITNESS:	Get some information from him.

(R6- 64-65; accord. R6- 26-28).

Jailor Worthy's testimony was buttressed by a remarkable 21-page statement, first given orally by inmate Evans to Atlanta police officials in July of 1978 and later memorialized in writing in August of 1978. (R4- 141-142). In the typewritten statement, Evans described in somewhat rambling detail how he began to question McCleskey about the crime. He bragged that, once in the adjacent cell, he (i) adopted a false name, (ii) claimed a family relationship with McCleskey's co-defendant, Ben Wright, (iii) lied about his own near-involvement in the crime, (iv) spoke to McCleskey about details of the crime which had not been made public and which were known only to Atlanta police and to the participants, (v) established himself with McCleskey as a reliable "insider," and then (vi) began systematically to press McCleskey for information about the crime.[3]

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[3] In his statement, inmate Evans bragged about his duplicity in dealing with Mr. McCleskey:

"I told Warren McClesky [sic] 'I got a nephew man, he in a world of trouble . . . ' McClesky asked me 'What is his name.' I told him 'Ben Wright.' McClesky said 'You Beens' [sic] uncle.' I said 'Yeah.' He said 'What's your name?' I told him that my name was Charles." (Fed. Exh. 8, at 3).

After Evans falsely assured McCleskey that he had seen Wright a few weeks ago, and that he "used to stick up with Ben," (*id.* at 4), Evans told McCleskey that "Ben told me that you shot the man yourself." (*Id.*), Evans then began to pry open the story of the crime. "I said man 'just what's happened over there?' " (*Id.*) After McCleskey told him some details of the crime, Evans continued his surreptitious interrogation: "And

(Continued on following page)

McCleskey's statements to informant Evans later became a centerpiece of the State's case during McCleskey's trial. The State used Evans' testimony to establish three important points: (1) that McCleskey had ostensibly confessed to informant Evans that he shot Officer Schlatt (T. Tr. 870-871); (2) that McCleskey told Evans " . . . he would have tried to shoot his way out . . . if it had been a dozen" police officers (T. Tr. 871);[4] and (3) that McCleskey had clarified to Evans what had become, during trial, a glaring inconsistency in the testimony of another principal State's witness.[5]

After hearing live testimony from jailor Worthy and all of the principal investigating police officers, and after reviewing informant Evans' 21-page statement, the District Court concluded that

> petitioner has clearly established a *Massiah* violation here. It is clear from Evans' written statement that he did much more than merely engage petitioner in conversation about petitioner's crimes

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then I asked McClesky what kind of evidence did they have on him." (*Id.* at 6).

In a subsequent conversation, Evans sought to learn the location of the missing murder weapon: "Then I said, 'They ain't got no guns or nothing man?' " (*Id.* at 7). When Bernard Dupree, Mr. McCleskey's co-defendant, overheard the conversations between Evans and McCleskey from his cell upstairs and became apprehensive, Evans worked to allay Dupree's suspicions, "talking to Dupree about Reidsville [and] just about ma[king] Dupree know me himself." (*Id.* at 9).

[4] This ostensible statement subsequently became a basis for the prosecutor's argument to the jury that Mr. McCleskey had acted with "malice." (*See* T. Tr. 974).

[5] Mamie Thomas – a store employee who said she "never forgets a face" (T. Tr. 303-304) – had told police shortly after the crime that the robber who entered the store from the front door had "rough facial features," a face that was "real bumpy" with a scar. (T. Tr. 301-302). None of these descriptions matched Mr. McCleskey. According to inmate Evans, however, McCleskey had confessed during their jailhouse conversations that he had been wearing makeup and a disguise on the day of the crime (T. Tr. 870-871; 876-879).

> . . . Evans repeatedly lied to petitioner in order to gain his trust and to draw him into incriminating statements. Worthy's testimony establishes that Evans, in eliciting the incriminating statements, was acting as an agent of the state. This case is completely unlike *Kuhlmann v. Wilson* . . . where the Court found no *Massiah* violation because the inmate informant had been a passive listener and had not deliberately elicited incriminating statements from the defendant. Here, Evans was even more active in eliciting incriminating statements than was the informant in *Henry*. The conclusion is inescapable that petitioner's sixth amendment rights, as interpreted in *Massiah*, were violated.

(J.A. 87-88).

C. Petitioner's Efforts To Uncover the Violation

1. Trial Counsel's Requests For Statements

Prior to Mr. McCleskey's 1978 trial, his defense attorney, John Turner, filed a written motion seeking all written or oral statements made by McCleskey to anyone, and all exculpatory evidence. (*See* J.A. 5-8). After an *in camera* inspection of the prosecutor's file, the trial court denied the motion, withholding both (i) the 21-page statement made by informant Evans and (ii) even the fact that the State *possessed* such a statement. (J.A. 9; Fed. Exh. M; R4-73-81; R6-118).

During mid-trial – as the prosecutor began to question Mr. McCleskey about whether he had ever made statements to another jail inmate (J.A. 16; T. Tr. 830) – defense counsel renewed his motion, orally demanding all documents in the State's possession that reflected any statements made by McCleskey. (J.A. 16-17; T. Tr. 830-832). The trial court, which apparently misunderstood the basis for defense counsel's legal contention, again denied the motion. During his colloquy with defense counsel, the trial judge inexplicably furthered the impression that the State possessed no undisclosed written statements at all. (Judge: "I don't know that we

are talking about *any written statements.") (Id.*) (emphasis added).[6]

Defense counsel nonetheless preserved an objection to the court's ruling and briefed the issue on appeal. The Georgia Supreme Court, in denying relief, contributed to defense counsel's misimpression, no doubt unwittingly, when it remarked that "[t]he evidence [that the defense counsel] sought to inspect *was introduced to the jury in its entirety.*" *McClesky v. State*, 245 Ga. 108, 263 S.E.2d 146, 150 (1980) (emphasis added).

In sum, both the trial court and the Georgia Supreme Court indicated that the State possessed no writings containing any statements of Mr. McCleskey that had not been disclosed to the defense during trial. Defense counsel subsequently testified that he "was never given any indication that . . . [any undisclosed] statement existed." (J.A. 23-24; St. Hab. Tr. 77).

2. Habeas Counsel's Investigations

Robert Stroup, assisted by lawyers from the NAACP Legal Defense & Educational Fund, Inc., entered Mr. McCleskey's case as a volunteer attorney in April of 1980, shortly before a petition for certiorari was filed on direct

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[6] It appears that the trial court assumed that defense attorney Turner's oral motion was predicated upon Mr. McCleskey's due process right to the disclosure of exculpatory information under *Brady v. Maryland*, 373 U.S. 83 (1963). The court thus responded to the motion by remarking that the District Attorney "has a statement that was furnished to the Court *but it doesn't help your client.*" (J.A. 17) (emphasis added). The prosecutor, apparently sharing the trial court's misimpression, added that "[i]t's not exculpatory." (*Id.*)

The trial court – also confounded Offie Evans' 21-page written statement with Warren McCleskey's oral statements, made to Evans, that were *contained within* Evans' written statement – then stated: "This is not a statement of the defendant . . . I don't know that we are talking about any written statement." (*Id.*). Defense attorney Turner, however, held fast to his motion, insisting, "I am saying I filed for oral and written statements. I asked for all statements of the defendant." (*Id.* at 18).

appeal.[7] Although Mr. Stroup had nothing more than an unsubstantiated suspicion of a *Massiah* violation – based on Evans' proximity to Mr. McCleskey's cell and Evans' later appearance as the State's witness – Stroup nonetheless decided to include a claim under *Massiah v United States*, 377 U.S. 201 (1964), in his amended state habeas petition, along with twenty-two other constitutional claims. (J.A. 20-22 at § 35; *id.* at 42-47).

Attorney Stroup pursued the *Massiah* claim with a field investigation designed to uncover any facts that might support it. The Fulton County Jail had been staffed in 1978 by several shifts of jailors (R6 76); the total cell population was between 900 and 1700; each shift was staffed by literally scores of officers. (R6 73). Stroup's strategy for locating possible *Massiah* witnesses from among the hundreds of potential witnesses led him first to several Atlanta police officers whom he had represented in unrelated Title VII cases. (J.A. 58). They advised him on the best way to uncover any available evidence of an illegal, jailhouse informant relationship. (J.A. 43-44; R4 31-32). Armed with their advice, Stroup interviewed a number of jailors at the Fulton County Jail "who were directly involved with Offie Gene Evans." (J.A. 59; *id.* at 43-44; R4 33). Stroup testified that "[b]asically, they had no recollection of the circumstances regarding how Evans came to be assigned to the jail cell that he was assigned to or of any conversations with the Atlanta Bureau of Police Services Detectives. . . . " (J.A. 45).

Attorney Stroup nonetheless persevered, tracking down a former jail official, Bobby Edwards, to whom he was directed. By early 1981, Mr. Edwards had retired and was living in Helen, Georgia, over 90 miles from Atlanta. (J.A.

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[7] Mr. Stroup testified that, throughout the course of state habeas corpus proceedings, he had responsibility for drafting all pleadings, carrying out investigations, and conducting all hearings. (J.A. 57). Lawyers from the NAACP Legal Defense Fund, while appearing formally on the papers, assumed a back-up role, responding to occasional legal questions from Mr. Stroup and receiving copies of pleadings. (*Id.; see also*, Fed. Exh. 1, Aff't of Boger, at 2 ¶3).

59-60). Through a realtor, Stroup managed to find him and to interview him. Edwards proved to have no knowledge that would support Mr. McCleskey's claim of a *Massiah* violation. (J.A. 60).

Although Mr. Stroup's field investigations on this claim – one of 22 separate constitutional issues which he, as *pro bono* volunteer attorney, was then pursuing –[8] bore no fruit, Mr. Stroup did not abandon the *Massiah* claim at that point. Instead, he sought to discover the prosecutor's file in the case. (J.A. 38; Fed. Exh. 2 at § 20). In response, one of Georgia's Assistant Attorneys General sent him a mass of documents, accompanied by a letter assuring Stroup that Stroup was receiving "*a complete copy of the prosecutor's file* resulting from the criminal prosecution of Warren McCleskey." (J.A. 29-30; Fed. Exh. 7) (emphasis added). Informant Evans' crucial 21-page statement was *not* included among the documents transmitted.[9]

To complete his investigation, Mr. Stroup questioned inmate Offie Evans under oath during state habeas proceedings (St. Hab. Tr. 114-132)[10] and deposed Russell Parker, the

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[8] While investigating Mr. McCleskey's other state habeas claims, Mr. Stroup conducted "more than 30" interviews with other witnesses. (J.A. 32).

[9] Mr. Stroup subsequently averred that, because he relied on these written representations of the State of Georgia, it never occurred to him that this representation was false, that a written statement existed, or that he was being misled. (J.A. 38; Fed Exh. 2, at ¶ 20.). At no time did lawyers for the District Attorney's office or for the Georgia Attorney General's office ever turn over to Mr. McCleskey a copy of Evans' 21-page statement.

[10] Stroup asked Evans when he had been placed in solitary confinement at the Fulton County Jail (St. Hab. Tr. 116), whether there was a "special reason" he had been put into solitary confinement (*id.* 116-117), whether he had been placed adjacent to the cell of Warren McCleskey (id. 117), the identity of the investigators and police officers who had spoken with him, when those conversations with police had occurred (*id.*

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Assistant District Attorney who had prosecuted McCleskey. (J.A. 25-28). Mr. Parker denied that the State's relationship with its key witness, Offie Evans, had been improper:

> Q. [Mr. Stroup]: Okay. Were you aware at the time of the trial of any understandings between Evans and any Atlanta police department detectives regarding favorable recommendation [sic] to be made on his federal escape charge if he would cooperate with this matter?
>
> A. [Assistant District Attorney]: No, sir.
>
> Q. Let me ask the question another way to make sure we are clear. Are you today aware of any understanding between any Atlanta police department detectives and Offie Evans?
>
> A. No, sir, I'm not aware of any.

(J.A. 26; Fed. Exh. 3, 9-10).

On cross-examination, the Assistant District Attorney broadened his testimony:

> Q. Do you have any knowledge that Mr. Evans was working as an informant for the Atlanta Police or any police authorities when he was placed in the

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117-118), whether he had been promised anything in exchange for his testimony against Mr. McCleskey (*id.*,122), and whether he had subsequently given testimony against any other inmates in other cases. (*Id.* 126-127). Informant Evans did not disclose that he had been moved from another cell to the cell adjacent to McCleskey's, that he had been asked by Atlanta detectives secretly to interrogate Mr. McCleskey, that he had agreed to do so, or that he had given a 21-page written statement to Atlanta investigators. He did reveal, contrary to his testimony at trial (*see* T. Tr. 868-869; 882), that an Atlanta detective had promised to "speak a word for [him]" with authorities, on Evans' own pending charges, in exchange for his testimony against Mr. McCleskey. (St. Hab. Tr. 122). That admission became the basis for Mr. McCleskey's allegation of a violation of *Giglio v. United States*, 405 U.S. 150 (1972), a claim accepted by the District Court, *see* 580 F. Supp. 338, 380-384 (N.D. Ga. 1984), but later dismissed by the Court of Appeals. *See* 753 F.2d 877, 882-885 (11th Cir. 1987) (en banc).

> Fulton County Jail and when he overheard these conversations of Mr. McCleskey?
>
> A. I don't know of any instance that Offie Evans had worked for the Atlanta Police Department as an informant prior to his overhearing conversations at the Fulton County Jail.

(J.A. 28; Fed. Exh. 3, 14-15).

Mr. Stroup subsequently testified that, following McCleskey's state habeas proceedings, he concluded that the *Massiah* claim could not be substantiated:

> I looked at what we had been able to develop in support of the claim factually in the state habeas proceeding and made the judgment that we didn't have the facts to support the claim and, therefore, did not bring it into federal court.

(J.A. 55; R4- 44-45).

3. The Discovery Of The State's Cover-up

Offie Evans's 21-page statement did not come to light until June of 1987 – six years after Mr. McCleskey's initial federal habeas petition had been filed. Its existence was revealed only following a fortuitous development in an unrelated Georgia case.[11] Once the statement was in Mr.

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[11] In that case, *Napper v. Georgia Television Co.*, 257 Ga. 156, 356 S.E.2d 640 (1987), the Supreme Court of Georgia held, for the first time, that police investigative files were within the compass of the Georgia Open Records Act, O.C.G.A. § 50-18-72(a) and were, following of a direct criminal appeal, subject to disclosure during habeas corpus proceedings. Mr. Stroup immediately cited that then-recent decision, still pending before the Georgia Supreme Court on rehearing, in support of a request, made not to the Georgia Attorney General or to the prosecutor, but directly to counsel for the Atlanta Bureau of Police Services, asking for the original police files in Mr. McCleskey's case. (J.A. 35; R1-7-6). Because *Napper* was still pending on rehearing, attorneys for the Atlanta Bureau were reluctant to disclose the entire police file, but on June 10, 1987, they agreed to provide Mr. Stroup with one document – which proved to be the 21-page statement made by Offie Evans. (J.A. 36-37; R1-7-7).

McCleskey's possession, he acted immediately to make it the foundation of a *Massiah* claim which he included in his second federal petition filed in July of 1987. (*See* R1-9 & Exh. E).

Even when presented with Evans' written statement, State officials uniformly continued to deny any illegal conduct.[12] During the hearing on Mr. McCleskey's second federal petition, his attorneys nonetheless sought to develop all of the circumstances under which Evans' statement had been made. Asked by defense counsel *where* the statement had been taken, one of the police officers, Detective Welcome Harris, mentioned "a room [at the Fulton County Jail] that was occupied by a captain, and I don't think – he's no longer employed out there, I think his name is Worthy." (R4 195). Asked whether jailor Worthy had been present during the interview, Detective Harris replied, "No, sir. I'm sure he wasn't, you know." (R4 196).

Despite this denial and Worthy's long retirement from service at the jail, McCleskey's attorneys attempted to locate and subpoena him, as well as many other individuals whose names had surfaced for the first time during the federal hearing. (R4-21). Mr. Worthy's subsequent appearance and his testimony – detailing the secret meeting between informant Evans and Atlanta police officers in which the scheme to violate *Massiah* was developed – came as a complete surprise to both McCleskey's attorneys (R6- 51-53) and Georgia's Assistant Attorneys General. (R6- 5-6).

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[12] Assistant District Attorney Parker testified that he had never met with informant Evans prior to July 12, 1978; that, on that date, Evans volunteered essentially all of the information that was eventually memorialized in Evans' written statement taken on August 1st; and that Parker was unaware of any conversations between Atlanta police officers and Evans on any occasions other than July 12th and August 1st. (R4-140-142; *Id.* 151-153; R5- 78). Other Atlanta police officers consistently denied any prior meetings with informant Evans (R4- 200; R5- 3537) or, in the case of Detective Dorsey, professed not to recall any such meetings. (R5 57-60).

D. The Issue Of Harmless Error

1. The State's Evidence At Trial

As indicated above, there were no eyewitnesses to the shooting of Officer Schlatt, although a number of witnesses identified four robbers, including Warren McCleskey, as participants in the robbery. Several employees testified that they saw Mr. McCleskey enter the furniture store from the front door (T. Tr. 232; *id.* 297-299) while other employees saw his three co-defendants enter from the rear. (T. Tr. 266-267). The four robbers, however, herded all of the employees to several offices in the rear half of the store and forced them to lie face-down on the floor while they carried out the robbery. (T. Tr. 213-214; 267-268; 288-291). This was the state of affairs when Officer Frank Schlatt entered the furniture store by the front door.

No employee was able to testify ~~which~~ of the four robbers confronted Officer Schlatt and fired the shots that killed him. But the State offered two witnesses who told the jury that Warren McCleskey had confessed to the shooting. The first was Ben Wright, one of the robbers. Wright had been a leader in planning and carrying out the robbery; he had directed the other participants (*e.g.*, Tr. T. 654-656) and had led the efforts to obtain the store's receipts from the employees (*e.g.*, T. Tr. 266-267); and he was a likely suspect in the shooting. Wright acknowledged during his trial testimony that the State intended to recommend 20-year concurrent sentences, despite his role in the crime, in exchange for his testimony against Warren McCleskey. (T. Tr. 646-647; 682-683). The District Court later found that Wright's testimony "was obviously impeachable." (J.A. 89).[13]

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[13] Indeed, the District Court noted that there was "some question whether Ben Wright's testimony on the fact of the murder would have been admissible at all" under applicable Georgia evidentiary rules, *see* O.C.G.A. § 24-4-8, "absent corroboration by [informant] Evans' testimony" (J.A. 99 n.8) – although the District Court also noted that the Court of Appeals, on Mr. McCleskey's earlier appeal, had viewed the likely impact of Georgia law differently. (*Id.*)

Just before it retired to deliberate on guilt or innocence, the jury heard another witness, an apparently neutral third party, recount an ostensible jailhouse confession by McCleskey. That witness was Offie Evans. (T. Tr. 865-885).

Apart from the confessions reported by informant Evans and co-defendant Wright, the State's case against Mr. McCleskey *on the murder charge*[14] rested largely upon an effort to place the murder weapon in McCleskey's hand. Both Wright and Wright's girlfriend testified that, on the day of the crime, McCleskey had been carrying a silver .38 pistol linked to the homicide. (T. Tr. 649; 727). Yet on cross-examination, Wright admitted that he, not McCleskey, had personally carried the .38 pistol for weeks at a time prior to the crime. (J.A. 16; T. Tr. 682). Moreover, Wright's girlfriend was confronted, on cross-examination, with evidence that she had informed police, on the day she was arrested, that it was Wright, not McCleskey, who had carried a .38 pistol, while McCleskey "tote[d] a .45." (J.A. 11-14; T. Tr. 631-634).

2. The Issue For The Jury: Malice Murder

At the close of the guilt phase, the Superior Court instructed the jury on theories of malice murder (T. Tr. 998-999) and of felony murder. (T. Tr. 999-1000). The court's instructions indicated that, to find Mr. McCleskey guilty of malice murder, it would have to find that he personally caused the murder of Officer Schlatt or intentionally aided or abetted that crime. In its charge on malice murder, the trial court instructed the jury that "*a person commits murder when he unlawfully and with malice aforethought*, either express or implied, *causes the death* of another human being." (T. Tr. 1000) (emphasis added). In its charge on felony murder, the

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[14] Mr. McCleskey was convicted of two counts of armed robbery – for the Dixie Furniture Store robbery and for another, unrelated robbery – neither of them under challenge here, for which he is presently serving consecutive life sentences. *McClesky v. State*, 245 Ga. 108, 263 S.E.2d 146, 147 (1980).

trial court informed the jury that "[t]he homicide is committed in the perpetration of a felony when it is committed *by the accused* while he is engaged in the performance of an act required for the full execution of such a felony" (T. Tr. 1000) (emphasis added), and that the jury should convict "if you believe and find beyond a reasonable doubt that the homicide alleged in this indictment *was caused by the defendant* while he, the said accused, was in the commission of an armed robbery. . . . " (*Id.*).[15]

The jury plainly took the malice murder charge seriously, for during deliberations, it sought further instructions on that issue. The Superior Court repeated the instructions on malice murder set forth above. (T. Tr. 1007-1009). The jury later found Mr. McCleskey guilty of malice murder as well as two counts of armed robbery. (T. Tr. 1010).

II. The Opinions Below

A. The District Court's Ruling

The District Court began its consideration of Mr. McCleskey's *Massiah* claim with an extensive examination of the State's plea of abuse of the writ. At the outset of the July 8, 1987 hearing, the Court invited oral argument from the parties on the issue of abuse (R4- 4-13), then received exhibits and heard live testimony on that issue (R4- 17-52), and finally, engaged in an extensive colloquy with counsel

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[15] The court had earlier charged the jury generally concerning the doctrine of "parties to a crime," as follows:

> That statute says that every person concerned in the commission of a crime is a party thereto and may be charged with and convicted of commission of the crime, and then it has several subsections. It says that a person is concerned in the commission of a crime only if he directly commits the crime, intentionally aids or abets in the commission of the crime, or intentionally advises, encourages, hires, counsels or procures another to commit the crime.

(T. Tr. 94).

(R4- 53-120) before satisfying itself that the merits should be entertained.

In its subsequent written order, the District Court made comprehensive findings on the issue of abuse of the writ. The Court first addressed the State's defense of deliberate abandonment:

> [P]etitioner cannot be said to have intentionally abandoned this claim. Although petitioner did raise a *Massiah* claim in his first state petition, that claim was dropped because it was obvious that it could not succeed given the then-known facts . . . Abandoning a claim whose supporting facts only later become evident is not an abandonment that "for strategic, tactical, or any other reasons . . . can fairly be described as the deliberate by-passing of state procedures." *Fay v. Noia*, 372 U. S. 391, 439 (1963), quoted in *Potts v. Zant*, 638 F.2d 727, 743 (5th Cir. 1981) . . . This is not a case where petitioner has reserved his proof or deliberately withheld his claim for a second petition. *Cf. Sanders v. United States*, 373 U.S. 1, 18 (1963).

(J.A. 83-84). Turning to the issue of "inexcusable neglect," the Court followed controlling circuit precedent,[16] reasoning that

> there is . . . no inexcusable neglect unless "reasonably competent counsel" would have discovered the evidence prior to the first federal petition. This court [has] concluded . . . [that] counsel's failure to discover Evans' written statement was not inexcusable neglect. [R4- 118-119]. The same is true of

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[16] In *Moore v. Zant*, 824 F.2d 847 (11th Cir. 1987) (en banc), *remanded, Moore v. Zant*, ___ U.S. ___, 109 S.Ct. 1518 (1989), *rev'd on other grounds, Moore v. Zant*, 885 F.2d 1497 (11th Cir. 1989) (en banc), the Eleventh Circuit held that, on the issue of abuse of the writ, a habeas applicant represented by counsel would be chargeable with "counsel's actual awareness of the factual and legal bases of the claim at the time of the first petition and with the knowledge that would have been possessed by reasonably competent counsel at the time of the first petition." 824 F.2d at 851.

counsel's failure to discover Worthy's testimony. Petitioner's counsel represents, and the state has not disputed, that counsel did conduct an investigation of a possible *Massiah* claim prior to the first federal petition, including interviewing "two or three jailers." . . . The state has made no showing of any reason that petitioner or his counsel should have known to interview Worthy specifically with regard to the *Massiah* claim. The state argues that petitioner's counsel should have at least interviewed Detectives Harris and Dorsey and Deputy Hamilton. Given that all three denied any knowledge of a request to move Evans next to McCleskey, it is difficult to see how conducting such interviews would have allowed petitioner to assert this claim any earlier.

(J.A. 84-85).

The District Court concluded that

> the petitioner's *Massiah* claim as it is currently framed is not an abuse of the writ because . . . it is based on new evidence. Petitioner's failure to discover this evidence earlier was not due to inexcusable neglect.

(J.A. 85).

Turning to the State's defense of harmless error, the District Court made factual findings in support of its conclusion that Offie Evans' "testimony about petitioner's incriminating statements was critical to the state's case," and that the admission of Evans' testimony could not be deemed harmless:

> There were no witnesses to the shooting and the murder weapon was never found. The bulk of the state's case against the petitioner was three pronged: (1) evidence that petitioner carried a particular gun on the day of the robbery that most likely fired the fatal bullets; (2) testimony by co-defendant Ben Wright that petitioner pulled the trigger; and (3) Evans' testimony about petitioner's incriminating statements. As petitioner points out, the evidence on petitioner's possession of the gun in question was conflicting and the testimony of Ben Wright was obviously impeachable. . . . Because the

> court cannot say, beyond a reasonable doubt, that the jury would have convicted petitioner without Evans' testimony about petitioner's incriminating statements, petitioner's conviction for the murder of Officer Schlatt must be reversed pending a new trial.

(J.A. 89-90).

B. The Panel's Ruling

1. Abuse Of The Writ

The panel's opinion began with the express assumption "that McCleskey was unaware of both [informant Evans' 21-page statement and the existence of jailor Worthy]" when he filed his initial federal petition. (J.A 123). Given that assumption, the panel stated, the critical legal question was "whether McCleskey's unawareness of the *factual* bases for his *Massiah* claim at the time of his first federal habeas petition is sufficient to justify his failure to present the claim." (*Id.*).

In answering that question, the panel faulted the District Court for "misconstru[ing] the meaning of deliberate abandonment." (J.A. 124). The panel reasoned that since Mr. McCleskey's attorneys had been aware of the *legal* issue, (J.A. 125), it was appropriate to impute to them some unspecified knowledge of the facts as well. The panel concluded that, since counsel "did not accidentally fail to include the *Massiah* claim in the federal petition, but made a knowing choice not to pursue the claim after having raised it previously" (J.A. 125), the decision not to go forward with the *Massiah* claim in federal court "constitutes prima facie evidence of deliberate abandonment." (*Id*).

> [W]e must assume that at the time McCleskey filed his first state habeas petition, counsel had determined that there was some factual basis for a *Massiah* claim. Indeed, such a determination is not surprising. Not only was counsel aware that Evans was in a cell next to McCleskey, but counsel was also aware that some sort of relationship existed between Evans and the police, as this formed the basis of McCleskey's *Giglio* claim.

(*Id.*).

The panel also criticized counsel's investigation of the *Massiah* claim as "somewhat lacking." (J.A. 126). The panel specifically faulted counsel: (i) for his failure to have interviewed the two Atlanta detectives or the jailor mentioned by informant Evans (J.A. 126-127 n.12); and (ii) for his failure to have located jailor Worthy earlier. (J.A. 128). The panel dismissed the significance and the utility of Evans' 21-page statement – calling it "[a]t most . . . simply the catalyst that caused counsel to pursue the *Massiah* claim more vigorously" (J.A. 128) – and focused instead on the testimony of Worthy, which it called "[t]he key piece of evidence." (J.A. 128). The panel stated that McCleskey's attorneys "ha[d] not presented any reason why counsel would have been unable to contact Ulysses Worthy back in 1981 . . . [or] shown that a more extensive effort at that time . . . would not have turned up Worthy." (J.A. 128).[17]

> A petitioner and his counsel may not circumvent the abuse of the writ doctrine by failing to follow through with an investigation and then later asserting that the claim could not have succeeded earlier on the facts as then known. It will only be possible to avoid piecemeal litigation if counsel is required to make a thorough investigation of the facts at the time of petitioner's first petition for habeas corpus.

(J.A. 128-129).

The panel made no effort to reconcile its own findings with the District Court's express finding that counsel's investigation had been " 'reasonably competent' " (J.A. 84-85) and that petitioner had not been guilty of inexcusable neglect under the circumstances. (J.A. 85).

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[17] On rehearing, Mr. McCleskey noted for the panel's consideration that jailor Worthy was among literally hundreds of jailors assigned to the Fulton County Jail in 1978. His name surfaced only after Mr. McCleskey's attorneys managed to obtain informant Evans' 21-page statement and were questioning Atlanta Detective Harris about where the statement had been taken. (R4- 195). *See* Suggestion for Rehearing In Banc, dated December 11, 1989, at 21.

2. Harmless Error

In addressing the harmless error issue, the panel did not rely on the factual findings of the District Court, but instead, found that "[t]he officer was killed by the man who entered and secured the front of the store while the other three men were in the back" (J.A. 133) and that "McCleskey was identified by two of the store personnel as the robber who came in the front door." (*Id.*) The panel also found that "the officer was killed by a bullet from a .38 caliber Rossi handgun" (*Id.*) and that McCleskey was tied to the Rossi by the State's evidence. (*Id.*)

Relying on this "substantial amount of circumstantial evidence" (J.A. 132), the panel concluded that the

> evidence other than Evans' testimony presented in the case presents such clear indication of McCleskey's guilt, [that] this court finds beyond a reasonable doubt that the jury would have convicted and sentenced McCleskey as it did even without Evans' testimony.

(J.A. 135).

The panel dismissed the effect on Mr. McCleskey's jury of Evans' account of McCleskey's boast – "I would have shot my way out if it had been a dozen police officers" – as "not crucial" to the State's effort to demonstrate that Mr. McCleskey was guilty of murder with malice. (J.A. 134).[18] The panel also dismissed the impact on the jury's verdict of Evans' testimony that McCleskey had confessed to using makeup. Since other witnesses had identified McCleskey as the robber who entered by the front door, the panel reasoned,

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[18] The panel followed an opinion by the Court of Appeals on Mr. McCleskey's first appeal, observing that the prosecutor had advanced two other arguments, in addition to the boast, to support his claim that McCleskey acted with malice. (J.A. 134). The panel also cited the Court of Appeals' earlier observation that the "statement by McCleskey was not developed at length during Evans' testimony and was mentioned only in passing by the prosecutor in closing argument." (J.A. 134).

the clarification of the discrepancies in the description proffered by a key State eyewitness were " 'relatively unimportant.' " (J.A. 133).

Turning from the guilt-or-innocence verdict to the jury's decision to impose a death sentence, the panel found "no reasonable likelihood" that the jury's decision was affected by Evans' testimony, reasoning that the prosecutor did not introduce Evans as a witness at the sentencing phase or dwell upon his testimony during his closing sentencing argument. (J.A. 134).

SUMMARY OF ARGUMENT

The principal issue on this appeal is whether petitioner Warren McCleskey abused the writ of habeas corpus by omitting a claim under *Massiah v. United States* from his initial federal petition. The District Court found that Mr. McCleskey had not abused the writ, since he could not be charged either with a knowing, "deliberate abandonment" of the claim or with "inexcusable neglect" in failing to find the crucial evidence sooner.

The panel's opinion, which disagrees with those findings, can be read in one of two ways: (i) either it announces a new, "thorough investigation" standard which it proposes to engraft onto the "deliberate bypass" branch of traditional abuse doctrine; or (ii) contrary to Rule 52(a), it substitutes its own factfindings on the reasonableness of counsel's investigation for those of the District Court.

We will show that to accept the former interpretation would require the Court to abandon three hundred years of common law jurisprudence on successive habeas corpus applications and to disregard the plain intention of Congress, presently embodied in 28 U.S.C. §§ 2244 and 2244(b) and Rule 9(b). On the other hand, to accept the latter interpretation would require the Court to repudiate its own prior teachings on the limited role assigned to appellate factfinders by Rule 52(a). Neither consequence is acceptable.

Since at least the Habeas Corpus Act of 1679, English law has permitted habeas applicants to make successive applications without limit. Because adverse adjudications were not *res judicata*, an applicant could go from court to court until he secured his release. Moreover, though adverse rulings could be challenged in successive applications, a decision to *discharge* an applicant could not be appealed. In the late eighteenth and early nineteenth centuries, this English tradition respecting habeas corpus passed into the common law of most American states. Even when some states began to pass statutes restricting this unlimited access to successive applications, they typically allowed such applications when new evidence had come to light.

The common-law tradition pervaded, not only state law, but federal law as well. When this Court first addressed the issue of successive petitions, in *Salinger v. Loisel*, 265 U.S. 224 (1924), and *Wong Doo v. United States*, 265 U.S. 239 (1924), it ratified that tradition, rejecting any strict application of *res judicata* principles and instead asking only whether an applicant brought his successive claims in good faith, without reserving evidence or claims that were "accessible at all times." During the following twenty years, the Court ruled favorably in a number of cases brought by successive applicants. Most clearly, in *Price v. Johnston*, 334 U.S. 266 (1948), the Court refused to deny a habeas applicant, on his fourth federal application, a full opportunity to show that his failure to have asserted a claim earlier might be explained by State misconduct in hiding the relevant evidence.

Congress, which had extended federal habeas protection to state prisoners in 1867, acted in 1948 to codify certain basic procedural rules governing its use. Disclaiming any intention to modify standards that had been established by this Court, Congress rejected a number of proposals that would have sharply curtailed the availability of successive petitions. After the Court decided *Sanders v. United States*, 373 U.S. 1 (1963), outlining the basic framework for analysis of repeater petitions, Congress twice acted to ratify and incorporate the standards of *Sanders*, first in 28 U.S.C. § 2244(b) and then in Rule 9(b). Numerous legislative campaigns either

to outlaw successor petitions or to restrict them dramatically have failed in Congress.

Under *Sanders*, if a State pleads abuse of the writ in response to a habeas application, the applicant must demonstrate that he has not deliberately withheld or bypassed the claim he now asserts, and that he was not "inexcusably neglectful" in failing to identify and assert it earlier. The "deliberate bypass" standard draws its contours from *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938); it asks whether an applicant's prior conduct was truly voluntary, knowing and intelligent. If not, then there was no "deliberate bypass." The "inexcusable neglect" branch looks to whether the applicant's actions in previously omitting the claim are so inexcusable that it would be just to charge him with wilful disregard of orderly judicial procedures. *Sanders* also contemplates a third inquiry, asking generally whether the applicant has acted in bad faith, with an intent to "vex, harass, or delay."

The panel's adjudication of Mr. McCleskey's case appears to have added a new "thorough investigation" requirement to the traditional "deliberate bypass" branch of abuse doctrine. Its new rule would charge all habeas applicants, irrespective of good or bad faith, not only with knowledge of evidence "obviously known to them" or "accessible at all times" – indeed, not only with the fruits of a "reasonable investigation" (which the District Court found to have been conducted by Mr. McCleskey's lawyers) – but with all evidence that, in hindsight, might have been developed during a "thorough" investigation.

Such a rule constitutes an utter break with the common-law tradition, with this Court's prior precedents, and with Congressional intent. It substitutes a standard of virtual strict liability for the essentially subjective, good faith test that has traditionally guided federal inquiry in this area. Since federal habeas corpus is a statutory remedy, and since Congress has spoken on the question, no extensive policy discussion is necessary. The panel's decision was beyond its authority to adopt or apply.

Alternatively, if the panel has done nothing more than fault the adequacy of the investigation conducted by

McCleskey's lawyers, it has violated Rule 52(a) and *Amadeo v. Zant*, 486 U.S. 214 (1988). The District Court made fact-findings – both on the adequacy of counsel's investigation and on the accessibility of the newly proffered evidence – which are not clearly erroneous and which, therefore, bind the panel.

Finally, *Sanders* permits the courts to consider the equitable circumstances surrounding Mr. McCleskey's application. McCleskey's own conduct evinces no bad faith at all. He pleaded his *Massiah* claim at the earliest opportunity, based upon no more than a suspicion of governmental misconduct. He conducted a field examination, which he followed up by discovery and direct questioning under oath of a responsible State official. Unable to locate written documents or witnesses to substantiate his serious charge of State misconduct, he decided that the claim was meritless.

The State's conduct, no less than Warren McCleskey's, is subject to equitable scrutiny by a federal habeas court. Judged by equitable standards, the State is responsible for the knowledge and actions of each of its officials, including those State officers who conspired to violate *Massiah* and then deliberately suppressed evidence and lied to cover up their misconduct; and the State must be found guilty of bad faith. Under any of a number of equitable principles – the doctrine of unclean hands, the notion of equitable estoppel, the presumption that arises against one who suppresses or destroys evidence – the State should not be heard, on this record, to assert a defense whose essence is that Mr. McCleskey failed to discover earlier the State's concealment of its own misdeeds.

Finally, the panel held that the State's use of informant Offie Evans' testimony, in violation of *Massiah*, was harmless error, contributing neither to the jury's verdict of guilt nor to its sentence of death. In so holding, the panel plainly disregarded the District Court's findings of fact on important subsidiary issues concerning the weight and significance of the State's other evidence at trial; it thereby violated *Amadeo v. Zant*. Even were the panel free independently to make its own factfindings, it underestimates the importance of that testimony in placing responsibility for the murder squarely on

Mr. McCleskey. Moreover, the panel ignores the District Court's express findings that the State's other evidence was rife with contradictions and weaknesses which rendered the State's case – absent the confirming testimony of Offie Evans – an extremely shaky foundation for a verdict of malice murder or a sentence of death.

ARGUMENT

I

MR. MCCLESKEY AND HIS COUNSEL DID NOT (i) DELIBERATELY ABANDON HIS *MASSIAH* CLAIM, (ii) ACT WITH INEXCUSABLE NEGLECT, OR (iii) OTHERWISE ABUSE THE WRIT OF HABEAS CORPUS UNDER FEDERAL STANDARDS

The panel's judgment rests principally upon its conclusion that Mr. McCleskey – by asserting his Sixth Amendment claim under *Massiah v. United States*, 377 U.S. 201 (1964), and *United States v. Henry*, 447 U.S. 264 (1980), only in a second federal petition – has abused the writ of habeas corpus. To affirm that judgment, the Court would have to repudiate 300 years of Anglo-American jurisprudence on habeas corpus, numerous squarely controlling precedents decided by the Court itself over more than half a century, and the repeated, considered decisions of Congress addressing the specific issue presented here.

A. ABUSE OF THE WRIT – THE DOCTRINAL BACKGROUND

1. The Common Law

Although the origins of the writ of habeas corpus ad subjiciendum are murky, and its earliest forms and usages are the subject of scholarly debate[19], there is general agreement

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[19] *See* 9 W. Holdsworth, *A History of English Law* 104-112 (2d Ed. 1938); W. Church, *A Treatise on The Writ of Habeas Corpus* 3 (2d Ed. 1893); Jenks, *The Story of Habeas Corpus*, 18 L. Q. Rev. 64 (1902). *See*

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with Blackstone's assessment that it is "the most celebrated writ in the English law:"[20]

> It is "a writ antecedent to statute, and throwing its root deep into the genius of our common law . . . It is perhaps the most important writ known to the constitutional law of England, affording as it does a swift and imperative remedy in all cases of illegal restraint or confinement. It is of immemorial antiquity, an instance of its use occurring in the thirty-third year of Edward I."

Fay v. Noia, 372 U. S. 391, 400 (1963), *quoting Secretary of State for Home Affairs v. O'Brien*, 1922 A.C. 603, 609 (H.L.).

For at least the past 300 years, since Parliament's passage of the Habeas Corpus Amendment Act of 1679,[21] English law has refused to treat a judgment denying habeas corpus relief as *res judicata*; a habeas claim, dismissed by one court, could be successively presented without limit:

> It was always open to an applicant for it, if defeated in one Court, at once to renew his application to another. No Court was bound by the view taken by any other, or felt itself obliged to follow the law laid down by it. Each Court exercised its independent judgment upon the case, and determined for itself whether the return to the writ established that the detention of the applicant was in accordance with the law. A person detained in custody might thus proceed from court to court until he obtained his liberty.

Cox v. Hakes, 1890 A.C. 506, 527.

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also Oaks, *Habeas Corpus in the States – 1776-1865*, 33 U. Chi. L. Rev. 243 (1965), and authorities cited at note 2; Note *The Freedom Writ – The Expanding Use of Federal Habeas Corpus*, 61 Harv. L. Rev. 657 (1948), and authorities cited at note 3.

[20] 3 W. Blackstone, *Commentaries on the Laws of England* 129.

[21] 31 Car. 2, ch. 2. *See* Goddard, *A Note on Habeas Corpus*, 65 L. Q. Rev. 30, 32-33 (1949).

Moreover, while a judicial decision *denying* relief allowed further adjudication, a ruling *discharging* an applicant was not subject to further judicial challenge: "[H]is right to his liberty could not afterwards be called into question. There was no power in any Court to review or control the proceedings of the tribunal which discharged him."[22]

2. The Early American Experience

In the fledgling states at the time of the American Revolution, "the privilege of the writ of habeas corpus was transmitted into American law principally through tradition and the common law." Oaks, *Habeas Corpus in the States – 1776-1865*, 33 U. Chi. L. Rev. 242, 247 (1965). In consequence, most state courts throughout the nineteenth century held that an adverse habeas corpus ruling was not *res judicata*, and that successive applications should be entertained.[23] Some states eventually did, by statute, begin to place

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[22] *Cox v. Hakes, supra*, at 528. This rule was not altered in Great Britain until 1959, when the Queen's Bench Division held in *In re Hastings* (No.2) [1959] 1 Q.B.D. 358 that a Divisional Court – faced with a renewed application on the same evidence and the same legal ground – "having once exercised its discretion" had "an inherent jurisdiction to refuse . . . to hear the same matter argued again." The following year, the *Hastings* decision was modified in part by The Administration of Justice Act, 1960, 8 & 9 Eliz. 2, ch. 65, Section 14 (2), which permits a second application if "fresh evidence" is offered by the applicant.

[23] *See, e.g., In re Perkins*, 2 Cal. 424, 430 (1852) ("The statute never contemplated that a judgment upon one writ should be a bar to any further proceeding, but looks to a different result; and any prisoner may pursue his remedy of *habeas corpus* until he has exhausted the whole judicial power of the State"); *In re Snell*, 31 Minn. 110, 112 (1883) ("In some courts there appears to be a disposition to make the right to a second writ a question of expediency for the court to determine. This occurs to us to be a dangerous notion. The 'writ of liberty' is a writ of right."); *People v. Brady*, 56 N.Y. 182, 192 (1874); *In re Blair*, 4 Wisc. 522, 532 (1854).

constraints on the use of successive applications,[24] but such statutes typically provided that second applications should be entertained if newly discovered evidence became available.[25]

Since neither the text of the federal Constitution, Art. I, § 9, cl. 2, nor the Federal Judiciary Act of 1789, 1 Stat. 81 (1789) – both of which explicitly provided for the writ of habeas corpus – fully defined its procedures or scope, most early federal cases followed the English practice permitting successor petitions. For example, in *Ex Parte Kaine*, 3 Blatchf. 1 (S.D.N.Y. 1853), 14 Fed Cas. p. 78 (Case No. 7,597), a district court held that federal practice on habeas applications would be governed by the common law:

> [A]ccording to that system of laws, so guarded is it in favor of the liberty of the subject, the decision of one court or magistrate . . . refusing to discharge the prisoner, is no bar to the issuing of a second or third or more writs, by any other court or magistrate having jurisdiction of the case; and that such court or magistrate may remand or discharge the prisoner, in the exercise of an independent judgment upon the same matters.

Id. at 80.[26]

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[24] *See, e.g., Ex parte Turner*, 36 Mo. App. 75, 77 (1889); *In re Brittain*, 93 N.C. 587, 588 (1885); *Hibler v. State*, 43 Tex. 197 (1875).

[25] *See, e.g., Hibler v. State*, 43 Tex. 197, 199 ("A party may obtain the writ of *habeas corpus* a second time by stating in the application therefor that since the hearing of the first application important testimony has been obtained, which it was not in his power to produce at the former hearing.") *Contra. Ex parte Pattison*, 56 Miss. 161 (1878).

[26] In another often-cited federal case, *Ex parte Cuddy*, 40 F. 62 (C.C.S.D. Cal. 1889), Justice Field, sitting as a circuit justice, was presented with a second habeas petition by an applicant whose initial application had been denied by the full Court, in an opinion by Justice Harlan. *Ex parte Cuddy*, 131 U.S. 280 (1889). Justice Field noted that the full Court had rejected Cuddy's application, in part, because the record he presented was not sufficient to clarify a crucial matter at issue, and that, under the circumstances, the Court presumed that the trial court had acted

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3. The Modern Federal Authorities

a. The Court's Pre-1948 Cases

While the lower federal courts had decided numerous habeas corpus cases under the Act of 1867 by the early

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properly. 40 F. at 64. On his successive application, Cuddy sought to supplement the record, adding the missing facts.

Addressing his application, Justice Field first considered the legal background:

> The writ of *habeas corpus*, it is true, is the writ of freedom, and is so highly esteemed that by the common law of England applications can be made for its issue by one illegally restrained of his liberty to every justice of the kingdom having the right to grant such writs . . . The doctrine of *res judicata* was not held applicable to a decision of one court or justice thereon; the entire judicial power of the country could thus be exhausted. *Ex parte Kaine*, 3 Blatchf. 5, and cases there cited. The same doctrine formerly prevailed in the several states of the Union, and, in the absence of statutory provisions, is the doctrine prevailing now.

40 F. at 65.

Noting, however, that "[i]n many instances great abuses have attended this privilege," Justice Field held that "while the doctrine of *res judicata* does not appiy . . . the officers before whom the second application is made may take into consideration the fact that a previous application has been made to another officer and refused; and in some instances that fact may justify a refusal of the second." *Id.* 65-66.

In Cuddy's case, Justice Field reasoned, the second application was being made "upon the same facts presented, or which might have been presented, on the first." The opinion stressed that "there are no new facts which did not exist" earlier, *Id.* at 66, and that Cuddy neither (i) attempted to make a second, supplemented application, adding the omitted facts, before seeking to appeal nor (ii) suggested, at any point during his appeal, "that the record did not fully disclose [his] . . . case." *Id.* Under those circumstances, the writ was dismissed.

twentieth century,[27] this Court first spoke authoritatively to the question of successive petitions in *Salinger v. Loisel*, 265 U.S. 224 (1924). Salinger had successfully avoided federal mail fraud charges in the State of South Dakota through "a protracted resistance" in the courts. He had obtained adverse habeas rulings, on essentially the same ground, from federal district and circuit courts in New York and from federal district and circuit courts in Louisiana – all prior to his presentation of the application eventually considered on certiorari by the Court. 265 U.S. at 228.

Although the Solicitor General strongly urged the Court to invoke *res judicata* as a bar to Salinger's successor petition for habeas corpus, the Court declined to do so:

> We are unable to go so far. At common law the doctrine of *res judicata* did not extend to a decision on *habeas corpus* refusing to discharge the prisoner. The state courts generally have accepted that rule where not modified by statute; the lower federal courts usually have given effect to it; and this Court has conformed to it and thereby sanctioned it, although announcing no express decision on the point.

265 U.S. at 230. Instead, after reviewing both the pertinent federal habeas statute[28] – which directed the court "to dispose of the party as law and justice may require" – and the decisions of lower federal courts applying the statute, the Court declared that

> each application is to be disposed of in the exercise of a sound judicial discretion guided and controlled

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[27] In 1927, Professor Dobie, surveying the federal judicial treatment of habeas corpus cases under the Act of 1867, wrote: "[T]he federal courts have grounded their decisions in *habeas corpus* cases not on literal technicalities but on a broad conception of essential justice. The Supreme Court has manifested somewhat the spirit of a chancellor in formulating a decree in equity." Dobie, *Habeas Corpus in the Federal Courts*, 13 Va. L. Rev. 433, 458 (1927).

[28] The Habeas Corpus Act of Feb. 5, 1867, ch. 28, § 761, Rev. Stat., 14 Stat. 385.

> by a consideration of whatever has a rational bearing on the propriety of the discharge sought . . . [including] a prior refusal to discharge on a like application.

Id. Since the district and circuit courts had exercised their discretion to reach the merits of Salinger's claims, the Court did so as well, rejecting the merits as insufficient. *Id.* 232-238.

The Court clarified what "sound judicial discretion" might require in *Wong Doo v. United States*, 265 U.S. 239 (1924), another successive petition case rendered the same day as *Salinger*. Wong Doo, seeking to avoid deportation, had filed an initial petition asserting two grounds. The government's return had placed both grounds at issue. Yet at his initial federal hearing, Wong Doo had presented evidence and sought adjudication only on the first ground. When the initial litigation proved unsuccessful, Wong Doo filed a second federal application, reasserting the abandoned second ground. 265 U.S. at 240.

The Court, though reiterating that *res judicata* was no absolute bar to Wong Doo's application, nonetheless affirmed the lower court's dismissal. Since Wong Doo had failed to offer any proof on his second claim at the initial federal hearing – even though, the Court observed, he "had full opportunity" to do so, since the proof "was accessible all the time," 265 U.S. at 241 – his claim was properly dismissed. "To reserve the proof for use in attempting to support a later petition, if the first failed," the Court held, "was to make an abusive use of the writ of *habeas corpus*." *Id.*

In the next twenty years, the Court decided a number of habeas claims brought on second applications, some of them favorably to the applicant.[29] The most significant was *Price v.*

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[29] *In United States ex rel. McCann v. Adams*, 320 U.S. 220 (1943), for example, the Court held that the lower courts should not have dismissed a second habeas petition – brought by the relator after this Court had itself denied his first application, *see Adams v. United States ex rel. McCann*, 317 U.S. 269 (1942) – since the issue presented in the

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Johnson, 334 U.S. 266 (1948), in which a federal prisoner alleged, on his *fourth* federal application, that the Government had induced a key witness to change his testimony during the trial, thereby suborning perjury. The exasperated lower court denied relief, stressing (i) that Price had litigated two prior habeas petitions through the courts of appeals, *Price v. Johnston*, 161 F.2d 705, 706 (9th Cir. 1947), (ii) that Price had proffered "no reason or excuse . . . for his failure to set [the prosecutorial misconduct claim] up in . . . his prior petitions," *Id.* at 707, and (iii) that, since the witness had changed his testimony openly during the course of the trial, Price appeared to know "as much about the [alleged] misconduct at the time it is said to have occurred as he knows now." *Id.*

Despite these considerations, the Court refused to dismiss Price's petition:

> If called upon, petitioner may be able to present adequate reasons for not making the allegation earlier, reasons which make it fair and just for the trial court to overlook the delay. The primary purpose of a habeas corpus proceeding is to make certain that a man is not unjustly imprisoned. And if for some justifiable reason he was previously unable to assert his rights or was unaware of the significance of relevant facts, it is neither necessary nor reasonable to deny him all opportunity of obtaining judicial relief.

334 U.S. at 291.

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second application "was explicitly withdrawn from consideration on the habeas corpus proceedings previously before the Circuit Court of Appeals [and] . . . has never been adjudicated on its merits by the lower courts." 320 U.S. at 221.

In *Waley v. Johnston*, 316 U.S. 101 (1942), the Court held that, when an applicant proffered an excuse for his failure to present a claim on an earlier coram nobis application, a second petition ought not be denied without a hearing. 316 U.S. at 105.

b. The Congressional Choice

Price was decided one month before Congress enacted a comprehensive codification of the Judicial Code which included, for the first time in eighty years, a new federal statute addressing the writ of habeas corpus. In drafting what became 28 U.S.C. § 2244, Congress carefully considered pleas by respected jurists, among others,[30] for a provision that would sharply curtail the traditional federal policy allowing successive habeas applications. However, the House Judiciary Committee, in its report on the 1948 legislation, emphasized that its intent in presenting proposed § 2244 was to "make[] no material change in existing practice." H.R. Rep. 308, 80th Cong., 1st Sess. A178 (1947).[31]

The Senate Judiciary Committee, for its part, while accepting other recommendations from the Judicial Conference, chose to modify the language of its proposed § 2244 to emphasize that federal courts would retain their traditional

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[30] *See, e.g., Report of the Judicial Conference of Senior Circuit Judges* 18 (1945); *Report of the Judicial Conference, Rep. Att'y Gen.* 67-69 (1943). *See also* Parker, *Limiting the Abuse of Habeas Corpus*, 8 F.R.D. 171, 172 (1948) (decrying "evils . . . [from] this flood of litigation"); Goodman, *Use and Abuse of the Writ of Habeas Corpus*, 7 F.R.D. 313 (1948) (lamenting that during the preceding decade, 26 inmates of Alcatraz had filed 167 petitions). Other judges expressed their dissatisfaction in reported opinions. *See, e.g., Dorsey v. Gill*, 148 F.2d 857, 864 (App. D.C. 1945), *cert. denied*, 325 U.S. 890 (1945) (cataloging at great length the dimensions of the federal burden and the possible remedies that could be adopted).

[31] The House Judiciary Committee indicated that it was far from oblivious to the problem of abusive petitions; on the contrary, it explicitly noted that "[t]he practice of suing out successive, repetitious, and unfounded writs of habeas corpus imposes an unnecessary burden on the courts." H.R. Rep. 308, 80th Cong. 1st Sess. A178 (1947). Yet the Report concluded that the current procedures were adequate to protect against abuses: "[T]he courts have consistently refused to entertain successive 'nuisance' applications for habeas corpus." (*Id.*)

equitable power to entertain successive petitions. "The original language of the section," the Senate Committee feared, might be read to

> den[y] to Federal judges the power to entertain an application for a writ of habeas corpus where the legality of the detention has been determined on a prior application. The amendment [would] . . . modify this provision so that, while a judge need not entertain such a later application for the writ under such circumstances, he is not prohibited from doing so if in his discretion he thinks the ends of justice require its consideration.

S. Rep. No.1559, 80th Cong. 2d Sess 9 (1948).

Section 2244, as revised, passed the full Senate and became law on June 25, 1948. During the succeeding eighteen years, literally dozens of efforts were made to persuade Congress to narrow § 2244. As Justice Harlan subsequently noted,

> [c]oncern with existing and potential abuse of the remedy . . . led to proposals that successive applications . . . on grounds previously available would be wholly barred. . . . E.g., HR 4232, 79th Cong, 2d Sess. These proposals were rejected in favor of the traditional discretion exercised by courts with respect to successive applications. . . .

Sanders v. United States, 373 U.S. 1, 26 (1963). *See also* H.R. Rep. No. 1892, 89th Cong., 2d Sess. 3 (1966) (reciting other proposed bills). None of these efforts succeeded.

c. The Court's Opinion in *Sanders*, And Its Congressional Ratification

In 1963, the Court decided *Sanders v. United States*, in which it distinguished between two basic types of successive petitions and announced different modes of analysis appropriate to each.

The truly "successive petition," the Court held, involves a second presentation of a claim previously adjudicated, adversely, on its merits. 373 U.S. at 15. Contrasted with successive petitions are repeater applications asserting claims that, for variety of reasons, were never judicially determined

on an earlier application. *Id.* at 17. "Full consideration of the merits" of these latter applications, the Court held, "can be avoided only if there has been an abuse of the writ. . . . " 373 U. S. at 17.

To determine whether a claim is abusive, *Sanders* directed the federal courts to apply the historically established principles of equity jurisprudence:

> "[H]abeas corpus has traditionally been regarded as governed by equitable principles. United States ex rel. Smith v. Baldi, 344 U.S. 561, 573 (dissenting opinion). Among them is the principle that a suitor's conduct in relation to the matter at hand may disentitle him to the relief he seeks . . . Thus, for example, if a prisoner deliberately withholds one of two grounds for federal collateral relief at the time of filing his first application, in the hope of being granted two hearings rather than one . . . he may be deemed to have waived his right to a hearing . . . The same may be true if, as in Wong Doo, the prisoner deliberately abandons one of his grounds at the first hearing. Nothing in the traditions of habeas corpus requires the federal courts to tolerate needless piecemeal litigation, or to entertain collateral proceedings whose only purpose is to vex, harass, or delay.

372 U.S. at 18.

For further guidance, the Court directed the lower courts to its simultaneous rulings in *Fay v. Noia*, 372 U.S. 391, 438-440 (1963), and *Townsend v. Sain*, 372 U.S. 293, 317 (1963), whose principles, the Court held, "govern equally here." 373 U.S. at 18. *Fay* and *Townsend* propound a two-pronged test for determining whether a habeas applicant should be heard on the merits of his claims: (i) whether he "deliberately abandoned or bypassed" an opportunity to assert the claim; and if not, (ii) whether his failure to do so was somehow a product of "inexcusable neglect."

(i) "Deliberate Bypass"

Deliberate bypass or abandonment, the Court explained in *Fay*, should be measured in accordance with

> the classic definition of waiver enunciated in *Johnson v. Zerbst*, 304 U.S. 458, 464 [1938] – "an intentional relinquishment or abandonment of a known right or privilege."

372 U. S. at 439. In deciding whether an applicant has deliberately bypassed or abandoned a claim, the Court rejected any tendency "to introduce legal fictions into federal habeas corpus." *Id.* Instead, the Court insisted, analysis must focus upon the applicant's actual state of mind, and it must probe, not only whether his decision was voluntary, but whether it was "knowing and intelligent" as well.

In so holding, the Court acted consistently with prior federal case law reserving condemnation for habeas applicants, like Wong Doo, who had deliberately held back evidence that was already in their possession or was readily at hand.[32]

Congress subsequently modified § 2244 in 1966, and in doing so, it adopted the distinction the Court had drawn in *Sanders*. We respectfully refer the Court to the Brief on Behalf of Respondent in *Zant v. Moore*, (No. 87-1104), ___ U.S. ___, 109 S.Ct. 1518 (1989), pages 28-29, for a more thorough account of the legislative history of 28 U.S.C. § 2244(b). In short, although the House Judiciary Committee indicated that, in fashioning § 2244(b), it intended to provide "for a qualified application of res judicata," H.R. Rep. No. 1892, 89th Cong., 2d Sess. 8 (1966), the Senate Report identified the target of the preclusion principle as those "applications either containing allegations identical to those asserted in a previous application that has been denied, *or predicated upon grounds obviously well known to them when*

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[32] *See, e.g., Swihart v. Johnston*, 150 F.2d 721, 723 (9th Cir. 1945) (while second petition included certain evidentiary allegations that first petition did not, "[o]bviously . . . these matters (if true) were known to appellant when he filed the [earlier] petition"); *Garrison v. Johnston*, 151 F.2d 1101, 1013 (9th Cir. 1945) (same); *Turner v. United States*, 258 F.2d 165, 167 (D.C. Cir. 1958) (allegations could have been raised in prior application, and applicant presented "[n]o indication of any 'justifiable reason' or 'unawareness' to explain their omission").

they filed the preceding application." S. Rep. No. 1797, 89th Cong., 2d Sess. 2 (1966) (emphasis added).

When Congress in 1976 revisited the question of successive petitions – in Rule 9(b) of the Rules Governing Section 2254 Cases – it once again clarified its intention that applicants should not be barred from asserting new claims on a second habeas application absent proof of deliberate bypass or inexcusable neglect.[33] In its own subsequent decisions, the Court has adhered to these standards set forth in *Sanders*, § 2244(b), and Rule 9(b). *See, e.g., Smith v. Yeager*, 393 U.S. 122 (1968) (per curiam) (allowing claim on second federal application despite counsel's apparent waiver of federal hearing on identical claim during prior application).

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[33] Exercising its reserved authority under 28 U.S.C. § 2072, Congress did *not* initially allow the Judicial Conference Rules to become law. Instead, in response to sharp criticism from some quarters, Congress voted to delay the effective date of the proposed rules in order to afford itself the opportunity to review and amend the rules if necessary. *See* Act of July 8, 1976, Pub. L. No. 94-349, 90 Stat. 822.

In its ultimate report on the proposed Rules, the House Committee on the Judiciary recommended a change in the language proposed by the Judicial Conference for Rule 9(b):

> The committee believes that the 'not excusable' language created a new and undefined standard that gave a judge too broad a discretion to dismiss a second or successive petition. The 'abuse of writ' standard brings rule 9(b) into conformity with existing law. As the Supreme Court has noted in reference to successive applications for habeas corpus relief and successive § 2255 motions based upon a new ground or a ground not previously decided on the merits, 'full consideration of the merits of the new application can be avoided only if there has been an abuse of the writ or motion remedy; and this the Government has the burden of pleading.' *Sanders v. United States*, 373 U.S. 1, 17 (1963). See also 28 United States Code, section 2244(b).

H.R. Rep. No. 94-1471, 94th Cong., 2d Sess. (1976). On September 28, 1976, Rule 9(b) was enacted into law. Act of Sept. 28, 1976, Pub. L. 94-426, 90 Stat. 1335.

(ii) "Inexcusable Neglect"

The Court's doctrine on inexcusable neglect begins with *Townsend v. Sain*, a right-to-a-federal-hearing case. The Court clarified in *Townsend* that "inexcusable neglect" would require more than mere "neglect;" indeed, such conduct must so closely approach deliberate manipulation that a court can only attribute the neglect to a willingness to subvert orderly judicial process, not mere carelessness. Thus in *Townsend*, the Court declined to brand as "inexcusable" a defense counsel's failure at trial to develop fully the testimony of his own crucial expert witness.[34]

In subsequent cases, the Court has faulted those applicants who offer no explanation for their failure to present claims in earlier applications when the evidence to support them was, to all appearances, available at the time of those earlier applications. In *Woodard v. Hutchins*, 464 U.S. 377 (1984) (per curiam), for example, Justice Powell criticized a repeater petition when the only "new evidence" advanced in support of a claim of insanity was "the report of a forensic psychiatrist . . . [without any] expla[nation] why this examination was not conducted earlier." 464 U.S. at 379-380 (Powell, J., concurring). The Court has also rejected repeater petitions accompanied by plainly spurious explanations. Thus, in *Antone v. Dugger*, 465 U.S. 200 (1984) (per curiam), the

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[34] Townsend sought an evidentiary hearing on a claim that his confessions had been the product of a drug-induced state brought on by the State's administration of a "truth serum" during his custodial interrogation. 372 U.S. at 295-303. Although there had been extensive expert testimony at trial on the drug's effects on Townsend, his counsel had failed to develop fully the point that the drug involved was "a truth serum" which might have prompted Townsend's confession. 372 U.S. at 321. The Court reasoned that "[t]his fact was vital to whether his confession was the product of a free will and therefore admissible," and that "the medical experts' failure to testify fully cannot realistically be regarded as Townsend's inexcusable default." 372 U. S. at 322. Thus although the counsel plainly erred by neglecting to ask his own witness certain crucial questions, the Court refused to brand his conduct "inexcusable."

applicant's only excuse for failing to carry forward a prosecutorial misconduct claim was "the press of time during the first set of collateral proceedings." 465 U.S. at 203. After reviewing the record, the Court rejected this explanation, underscoring that (i) "almost two years [had] . . . elapse[d] between the affirmance of [Antone's] . . . conviction and the filing of his first motion for postconviction relief," 465 U.S. at 206 n.4; (ii) Antone "continued to be represented throughout this period by his trial counsel," *id.*; and (iii) inasmuch as a stay had been granted by the Court of Appeals, the "first federal habeas petition . . . was not conducted under the pressure of imminent execution." Id.

By contrast, the presentation of a new claim in a second or successive federal habeas petition has consistently been held excusable by the lower courts when it was based upon the applicant's discovery of new evidence neither previously known to him nor readily at hand, especially when State actors bear some responsibility for withholding that evidence. *See, e.g., Hamilton v. McCotter*, 772 F.2d 171, 183-184 (5th Cir. 1985); *Walker v. Lockhart*, 763 F.2d 942 (8th Cir. 1985) (en banc); *Johnson v. Cabana*, 661 F.Supp. 356 (S.D. Miss. 1987); *cf. Lewis v. Lane*, 832 F.2d 1446, 1456-1457 (7th Cir. 1987); *Freeman v. Georgia*, 599 F.2d 65, 72 (5th Cir. 1979). These cases have followed *Price v. Johnston* and the express statement of the Advisory Committee on the Rules that "newly discovered evidence" is one of several circumstances sufficient to excuse a prior failure to assert a claim. See Advisory Committee Notes on Rule 9(b).

(iii) Other Inequitable Conduct

Sanders' catalogue of abusive behavior was not strictly limited to instances of deliberate bypass or inexcusable neglect. Instead, emphasizing that equitable principles govern habeas corpus generally, the Court posited a general axiom that "a suitor's conduct in relation to the matter at hand may disentitle him to the relief he seeks." *Sanders v. United States, supra*, 373 U.S. at 17. A federal court need not "tolerate needless piecemeal litigation, or . . . entertain collateral

proceedings whose only purpose is to vex, harass, or delay." *Id.* at 18.

Both these words and the Court's reference to general equitable principles illuminate the limits of its concept of "abuse." Vexatiousness, harassment and delay had long been attributes identified with professional writ writers of the sort Judge Goodman described in his article, *Use and Abuse of the Writ of Habeas Corpus*, 7 F.R.D. 313, 315 (1948) (detailing abuses by Alcatraz inmates). To curb such abuses, the Court called for the kind of a judicial inquiry historically conducted by a chancellor in equity: Has the applicant acted in good faith? Does he come to the litigation with clean hands? Should either party be estopped from asserting a claim (or a defense) because of its prior conduct?

> All of these questions, the Court in Sanders held, are addressed to the sound discretion of the federal trial judges. Theirs is the major responsibility for the just and sound administration of the federal collateral remedies, and theirs must be the judgment as to whether a second or successive application shall be denied without consideration of the merits. Even as to such an application, the federal judge clearly has the power – and, if the ends of justice demand, the duty – to reach the merits.

373 U.S. at 18-19.

B. THE DISPOSITION OF MR. McCLESKEY'S CASE

As we have seen, *Sanders*, § 2244(b), and Rule 9(b) establish controlling standards by which to evaluate assertions of abuse of the writ. To determine whether Mr. McCleskey's *Henry/Massiah* claim constitutes an abuse, the first issue – and according to the Court of Appeals, the dispositive issue – is whether McCleskey "deliberately abandoned" his *Massiah* claim.

1. Mr. McCleskey Did Not Deliberately Abandon His *Massiah* Claim Or Bypass Orderly Judicial Procedures On His Initial Application

The District Court's factual findings on deliberate abandonment were not set aside by the Court of Appeals as

"clearly erroneous" under Rule 52(a), nor could they be. They therefore provide the foundation for subsequent review of this issue. *Amadeo v. Zant*, 486 U.S. 214, 223-22 (1988); *Anderson v. City of Bessemer City*, 470 U.S. 564, 573-576 (1985); *Pullman-Standard v. Swint*, 456 U.S. 273, 287-293 (1982).[35]

The panel purports to accept these findings (J.A. 123), differing only on a legal issue – "the meaning of deliberate abandonment." (J.A. 124). Yet as its opinion unfolds, the panel brands the investigation by Mr. McCleskey's counsel as "somewhat lacking" (J.A. 126), and declares broadly that to abandon a claim after "initial investigatory efforts" prove unsuccessful "cannot insulate a petitioner from abuse of the writ." (J.A. 127). The panel concludes its analysis with a holding that "counsel is required to make a thorough investigation of the facts at the time of petitioner's first petition for habeas corpus." (J.A. 129).

This analysis is subject to two possible interpretations: (a) either the panel has added a new, "thorough investigation" requirement to the traditional "deliberate bypass" inquiry, or (b) the panel has rejected, *sub silentio*, the District Court's factual findings that Mr. McCleskey's counsel conducted a reasonably adequate investigation. We will deal with the first

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[35] The District Court's principal findings on the delibertate bypass issue are as follows: (i) that "[a]t the time of his first federal petition, petitioner was unaware of [informant] Evans' written statement" (J.A. 83-84); (ii) that "petitioner did not have . . . Worthy's testimony at the time of his first federal petition" (J.A. 84); (iii) that "counsel did conduct an investigation of a possible *Massiah* claim prior to the first federal petition," one which, measured by the standards of "reasonably competent counsel," was adequate (J.A. 84-85); (iv) that there was "no showing of any reason that petitioner or his counsel should have known to interview Worthy specifically with regard to the *Massiah* claim" (J.A. 85); (v) that conducting interviews with three Atlanta police officers and jailors who later testified at the federal hearing "would [not] have allowed petitioner to assert this claim any earlier" (J.A. 85); and (vi) that the Massiah claim "was dropped because it was obvious that it could not succeed given the then-known facts." (J.A. 83).

possibility under the present heading; we will address the latter possibility under the heading of "inexcusable neglect."

Our earlier doctrinal review makes clear just how radically the panel's "thorough investigation" requirement departs from prior law. Since at least *Salinger* and *Wong Doo* in 1924, the primary focus of the federal law of abuse has been an applicant's good or bad faith, his possible inequitable manipulation of process. To check such misconduct, the Court and the Congress have settled upon a standard focused principally upon the subjective intent of the applicant (and his counsel). *Cf. Oregon v. Kennedy*, 456 U.S. 667 (1982). At its core are three questions drawn from *Johnson v. Zerbst*: Was the applicant's action voluntary? Was it knowing? Was it intelligent? If newly proffered evidence was "obviously well known" to an applicant, if that evidence was "accessible at all times," if an applicant had "full opportunity to offer proof of it" and simply "reserve[d] the proof for use in . . . a later petition," then his failure to assert the claim was voluntary, knowing and intelligent, and deliberate bypass has been shown.

The panel's new rule, by marked contrast, would impute to Mr. McCleskey not only knowledge which is so "accessible," so close to hand, that it "must have been" known, but all knowledge that, on judicial hindsight, *might somehow* have been obtained from a "thorough investigation." Good faith becomes irrelevant; proof of a "purpose to vex, harass or delay," unnecessary.

Whatever might be said for the wisdom of such a rule, it is indisputably not the present law. It cannot be squared with *Wong Doo*, with *Price*, with *Sanders*, with *Smith*, or with *Woodard* and *Antone*. More important, it cannot be squared with congressional intent, for in enacting § 2244, § 2244(b), and Rule 9(b), which incorporate the *Sanders* standard, Congress made a series of choices. It was presented with abundant evidence concerning the extent of the perceived problem, the apparent need for change, and the statutory alternatives – some of them nearly identical to the new rule adopted by the panel below. Yet Congress unmistakably rejected those alternatives. By dismissing, or ignoring, those Congressional choices and substituting its own, the panel erred. *See, e.g.*,

Autry v. Estelle, 464 U.S. 1301 (1983) (White, circuit justice).[36]

Moreover, even if the law permitted the fruits of a reasonable investigation to be imputed to counsel, Mr. McCleskey's attorneys conducted an investigation which the District Court later found to be "reasonably competent."[37]

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[36] "In my view, it would be desirable to require by statute that all federal grounds for challenging a conviction or a sentence be presented in the first petition for habeas corpus. Except in unusual circumstances, successive writs would be summarily denied. But historically, res judicata has been inapplicable to habeas corpus proceedings . . . and 28 U.S.C. § 2254 Rule 9 implicitly recognized the legitimacy of successive petitions raising grounds that have not previously been presented and adjudicated." 464 U.S. at 1303.

[37] We note the following steps, all of them indisputably taken by Mr. McCleskey's attorneys:

- o trial counsel formally moved to obtain all statements and exculpatory evidence from the State;
- o trial counsel renewed his request at trial, demanding all documents in the State's possession that reflected oral statements by McCleskey;
- o trial counsel appealed the issue of access to such statements;
- o habeas counsel, despite the lack of prior success by trial counsel, nonetheless asserted a Massiah claim;
- o habeas counsel sought to learn, through police officers' advice, which jail officials were most likely to know about any Massiah violation;
- o habeas counsel then interviewed those jail officials;
- o habeas counsel, having learned about a retired jail official who had been responsible for cell placement in 1978, tracked that jailor down to a town 90 miles away, to no avail;
- o habeas counsel sought from the State, and was given, what the State represented to be "a complete copy of the prosecutor's file;"

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What thwarted their efforts to prove their *Massiah* claim was not their own lassitude but the State's ten-year pattern of suppression of evidence, denial, and perjury. This is not a story of deliberate abandonment by an applicant, but of deliberate concealment by the State. *See Amadeo v. Zant, supra.*

The only legal standard under which counsel's investigation could properly be faulted would be a strict liability standard. If habeas attorneys are to be charged with knowledge of all possible evidence, no matter how obscure or tangential, no matter how thoroughly hidden by State actors, then Mr. McCleskey's attorneys are guilty of deliberate bypass. Nothing Congress has ever done, indeed, nothing we have found in the past 300 years of habeas corpus jurisprudence, would support the adoption of such a standard.

2. Mr. McCleskey's Conduct In Investigating His *Massiah* Claim Did Not Constitute "Inexcusable Neglect"

The District Court found that Mr. McCleskey's failure to raise the *Massiah* claim "was not due to his inexcusable neglect." (J.A. 84). "Reasonably competent counsel at the time of the first petition," the court held, would not have discovered either the statement of informant Evans or jailor Worthy. (J.A. 84-85)

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- o habeas counsel asked the prosecutor and the informant, under oath, whether there had been an improper relationship;
- o when the informant's 21-page statement was uncovered, habeas counsel immediately filed a second federal habeas petition;
- o habeas counsel questioned police officers to learn where the 21-page statement had been taken from Evans;
- o habeas counsel, having learned that it had been taken in jailor Worthy's office, found and subpoenaed Worthy to determine whether he had any relevant knowledge.

Although the panel purports not to overturn these factual findings, in truth it takes a sharply different view of the evidence. While the District Court found, for example, that informant Evans' 21-page statement "contains strong indications of an *ab initio* relationship between Evans and the authorities" (J.A. 84), the panel dismisses the statement as "[a]t most . . . simply the catalyst that caused counsel to pursue the *Massiah* claim more vigorously." (J.A. 128).[38] The District Court carefully examined the question whether reasonable counsel would have located jailor Worthy (J.A. 84-85) and it ultimately found "no . . . reason that petitioner or his counsel should have known to interview Worthy specifically." (J.A. 85). The panel reaches almost precisely the contrary conclusion: "McCleskey has not presented any reason why counsel would have been unable to contact Ulysses Worthy back in 1981 . . . [or why] a more extensive effort at that time . . . would not have turned up Worthy." (J.A. 128).[39]

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[38] The panel's assessment undervalues the statement in at least two important respects. (i) It was Evans' statement that provided the *sole direct link* between Offie Evans and Ulysses Worthy. Only when Detective Harris revealed, on crossexamination, that Evans' statement had been taken in jailor Worthy's office did Worthy first emerge as a possible witness from among the hundreds of jailors employed at the Fulton County Jail in July of 1978. *Second*, even had jailor Worthy somehow miraculously come to counsel's attention independently of the 21-page statement, his testimony alone could not have supplied proof of the "deliberate elicitation" required by *Massiah* and subsequent cases. It is Evans' own boastful statement that reveals his aggressive, persisteht interrogation of Mr. McCleskey – how completely Offie Evans moved from being a mere "listening post" or an "ear" to become a "voice . . . to encourage conversation."

[39] The panel's critique focuses upon a single strand of evidence that McCleskey's attorneys failed to pursue: follow-up interviews with three Atlanta law enforcement officers mentioned during state habeas proceedings. (J.A.126 n.12).

The panel's critique ignores two critical considerations. *First*, during the state habeas proceedings Mr. McCleskey's counsel heard Assistant

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In sum, the panel's analysis appears strikingly similar to the opinion faulted by this Court in *Amadeo v. Zant*, 486 U.S. 214 (1988). As in *McCleskey*, the issue in *Amadeo* was whether evidence, hidden by the State, was nonetheless "reasonably discoverable" by defense counsel. 486 U.S. at 222. As here, the district court in *Amadeo* after the receipt of live testimony and other evidence, made factual findings concerning the adequacy of defense counsel's investigation and the accessibility of the crucial evidence. 486 U.S. at 223. A panel of the court of appeals in *Amadeo* thereafter "substituted its own factual findings for those of the District Court" and "rejected . . . the District Court's conclusion that petitioner's lawyers did not deliberately bypass" appropriate judicial proceedings. 486 U.S. at 224. The same error appears to have recurred here. Unquestionably, *either* the panel's holding in *McCleskey* is a radical departure from the settled law of deliberate bypass – as we argued above – *or* it is a flat violation of *Amadeo v. Zant*, as we argue here. In either event, it should be reversed by this Court.

The panel's decision offends not only Rule 52 but the very concept of inexcusable neglect. On this record, what is inexcusable and what has delayed Mr. McCleskey's presentation of his *Massiah* claim to the courts for a decade is not any neglect on his part but concealment on the part of State officials. Unlike *Hutchins* or *Antone*, Mr. McCleskey's lawyers sought out all available evidence. They affirmatively presented what little they found to the state habeas court, and

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District Attorney Russell Parker – the police officers' superior and the State official charged with overall responsibility for the investigation and prosecution of the *McCleskey* case – testify under oath that the State had not entered into an informant relationship with Offie Evans prior to McCleskey's trial. *Second*, the District Court later found that one or more of the officers who, the panel believed, should have been interviewed, lied under oath in federal court to cover up their own prior misconduct.(J.A. 90). It is little wonder that the District Court held that counsel's failure to interview these officers would not have led to jailor Worthy sooner. (J.A. 85).

they sought in good faith to learn from responsible state officials whether there might be anything else to proffer. Only after those officials testified under oath that their conduct had been blameless and that McCleskey's suspicions were baseless did his counsel decide to drop the claim. That decision, made in good faith reliance upon the word of State officials, however naive it later proved, is not what this Court has ever meant by "inexcusable neglect."

3. Mr. McCleskey Did Not Otherwise Abuse The Writ

We have shown that Mr. McCleskey did not deliberately withhold his *Massiah* claim, and that his attorneys were not guilty of inexcusable neglect. The final inquiry is whether the actions of the parties provide any other equitable basis for barring consideration of the claim.

The equities, however, strengthen rather than weaken McCleskey's entitlement to be heard on the merits. On Mr. McCleskey's part, there is no evidence of bad faith. His lawyers did all they reasonably could to present evidence of a *Massiah* violation promptly to the state habeas corpus courts. A decision to carry the *Massiah* claim forward into federal court – to continue to assert serious charges against State officials despite what appeared to have been a full hearing, despite sworn denials by State officials, despite an absence of contrary evidence – would have been, at the least, a wasteful gesture and, at the most, an irresponsible plea.

A review of the State's conduct, by contrast, leads inexorably to a finding of bad faith. In various contexts, this Court has traditionally imputed the misconduct of any member of the prosecution team to the State itself. *See, e.g., Mooney v. Holohan*, 294 U.S. 103 (1935); *Brady v. United States*, 373 U.S. 83 (1963). The good faith of some State actors cannot excuse the bad faith of others. Especially is this true when Sixth Amendment claims are under consideration. As Justice Stevens explained in *Michigan v. Jackson*, 475 U. S. 625, 634 (1986),

> Sixth Amendment principles require that we impute the State's knowledge from one state actor to another. For the Sixth Amendment concerns the confrontation between the State and the individual.

See also Giglio v. United States, 405 U. S. 150, 154 (1972); *Santobello v. New York*, 404 U.S. 257, 262 (1971); *Cf. United States v. Bagley*, 473 U.S. 667, 671 & n.4 (1986).[40] It is surely appropriate in habeas corpus for the State's conduct, no less than the applicant's, to be judged by equitable standards. And since "a suitor's conduct in relation to the matter at hand may disentitle him to the relief he seeks," *Sanders v. United States, supra*, 373 U.S. at 17, the State here, because of the misconduct of State actors, should be disentitled to assert its defense of abuse-of-the-writ.

A variety of equitable doctrines support this conclusion. The State has brought unclean hands to this litigation.[41] State actors did far more than merely violate *Massiah*. When defense counsel began to investigate the relationship between Offie Evans and Atlanta police, those State actors affirmatively suppressed evidence and lied in an effort to hide their

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[40] The lower federal courts have regularly applied this rule to police misconduct of the sort at issue here. *See. e.g., Freeman v. State of Georgia*, 599 F.2d 65, 69-70 (5th Cir. 1979) ("We feel that when an investigating police officer willfully and intentionally conceals material information, regardless of his motivation and the otherwise proper conduct of the state attorney, the policeman's conduct must be imputed to the state as part of the prosecution team"); *Barbee v. Warden*, 331 F.2d 842 (4th Cir. 1964) ("The police are also part of the prosecution, and the taint on the trial is no less if they, rather than the State's Attorney, were guilty of the nondisclosure . . . ."); *Schneider v. Estelle*, 552 F.2d 593 (5th Cir. 1971); *Jackson v. Wainwright*, 390 F.2d 288, 296 (5th Cir. 1968); *Curran v. State of Delaware*, 259 F.2d 707, 713 (3d Cir. 1958).

[41] As Professor Dobbs has noted "unclean hands may be any sort of conduct that equity considers unethical . . . Th[e] rule is that unrelated bad conduct is not to be considered against the plaintiff. It is only when the plaintiff's improper conduct is the source, or part of the source, of his equitable claim, that he is to be barred because of this conduct. 'What is material is not that the plaintiff's hands are dirty, but that he dirties them in acquiring the right he now asserts. . . . ' " D. Dobbs, *Equity and Equitable Remedies* 46 (1973), *citing Republic Molding Corp. v. B.W. Photo Utilities*, 319 F.2d 347 (9th Cir. 1963).

misconduct. These acts constituted an independent wrong, separate from, though in furtherance of, the initial *Massiah* violation. Since the essence of the State's abuse defense depends upon Mr. McCleskey's delay in discovering the evidence that State officials were actively hiding, the State dirtied its hands in the very act of acquiring the defense that it now asserts against Mr. McCleskey.

Additionally, the State's conduct in suppressing Evans' statement should equitably estop it from claiming abuse.[42] The Court could even draw on more ancient doctrines, such as the venerable maxim "*omnia praesumuntur contra spoliatorem*," which

> embraces most frequently cases of the destruction or suppression of written evidence . . . [B]ut it has been said that to smother evidence is not much better than to fabricate it. [Black, J., in Bryant v. Stillwell, 24 Pa. St. 314 (1855).] "Spoliation," it is said in one case, [Little v. Marsh, 2 Ired. Eq. 28 (1841)] "is always looked upon by a court of justice with suspicion."

Lawson, *The Effect of Withholding, Suppressing and Manufacturing Evidence in Civil Cases*, 18 Am. L. Rev. 185, 200 (1884).

Indeed, the principle that a court should not permit a party to profit by its own wrongdoing is so fundamental that, in one guise or another, it pervades all areas of the law. No special rule need be fashioned to bar the State from asserting

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[42] Equitable estoppel, Professor Dobbs has explained, ordinarily "has three important elements. The actor, who usually must have knowledge of the true facts, communicates something in a misleading way, either by words, conduct or silence. The other relies upon that communication. And the other would be harmed materially if the actor is later permitted to assert any claim inconsistent with his earlier conduct." D. Dobbs, *Equity and Equitable Remedies* 42 (1973); *see* 3 J.Pomeroy, *Equity Jurisprudence* § 804 at 189 (5th Ed. 1941). *See generally, Moser v. United States*, 341 U.S. 41, 46-47 (1951); *Portmann v. United States*, 674 F.2d 1155, 1167 (7th Cir. 1982); *TRW, Inc. v. FTC*, 647 F.2d 942, 950-951 (1981) *Beacom v. EEOC*, 500 F. Supp. 428, 435-439 (D. Ariz. 1980).

of an abuse-of-the-writ defense against Warren McCleskey on the present record.[43]

III

THE STATE'S USE OF OFFIE EVANS' TESTIMONY AGAINST WARREN McCLESKEY DURING HIS CAPITAL TRIAL WAS NOT "HARMLESS ERROR" BEYOND A REASONABLE DOUBT

A. The Findings Of The District Court

The District Court made a number of important factfindings that were subsidiary to its conclusion that the State's Massiah violation was not harmless. It began its analysis by correctly noting that there had been no witnesses to the shooting (J.A. 89) and that the murder weapon had never been recovered. (*Id.*). The court then found that the State's case against Mr. McCleskey *on the murder charge* had been three-pronged: (i) evidence that McCleskey had carried a .38 Rossi, the pistol that most likely fired the fatal bullets, on the day of

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[43] The Court, in granting certiorari, framed its own question on the issue of abuse:

> Must the State demonstrate that a claim was deliberately abandoned in an earlier petition for a writ of habeas corpus in order to establish that inclusion of that claim in a subsequent habeas petition constitutes abuse of the writ?

McCleskey v. Zant, ___ U.S. ___, 110 S.Ct. 2585 (1990). Our foregoing discussion should indicate our answers to this question. First, although the State must plead deliberate abandonment, as Georgia did here, we concede that the burden of proof then falls upon the petitioner. Second, the State need not rest its allegations of abuse on charges of deliberate abandonment; inexcusable neglect or other vexatious conduct are alternative bases for a finding of abuse. If the State does charge deliberate bypass, however, the decisive issue is whether a claim was abandoned "deliberately." It is not enough to find that the claim was, in fact, abandoned; a court must find that the applicant did so in a voluntary, knowing, and intelligent way, that he exhibited a bad faith intention to reserve proof "obviously well known" to him or "accessible at all times." There is no basis here for such a finding against Warren McCleskey.

the robbery; (ii) testimony by co-defendant Ben Wright that McCleskey later told Wright he had pulled the trigger; and (iii) testimony by informant Offie Evans' about McCleskey's "jailhouse confession." (*Id.*).

In assessing the weight of this evidence, the District Court found that the first two prongs were not powerful. The State's evidence on the first prong – who was carrying the murder weapon on the day of the crime – was in conflict. (J.A. 89). Indeed, one of the State's witnesses, Mary Jenkins, had been confronted on cross-examination with a prior statement to police in which she identified her boyfriend, Ben Wright, and not McCleskey, as the person who regularly carried the .38 Rossi. (J.A. 11-13).

The District Court also found that Ben Wright's damaging testimony, recounting Mr. McCleskey's ostensible confession to Wright, was "obviously impeachable" because Wright was himself a prime suspect in the shooting who had a clear motive to shift responsibility for the murder to someone else. (J.A. 30)

Having found that the State's other evidence against McCleskey on the murder count was weak or in conflict, the District Court concluded that Offie Evans' testimony detailing McCleskey's ostensible jailhouse confession "was critical to the state's case" (J.A. 89) and that its admission into evidence was not harmless.

B. The Panel's Contrary View Of The Record

The panel disregarded the District Court's key findings of fact on the harmless error issue, substituting its own instead. Addressing the identity of the robber who carried the .38 Rossi, for example, the panel cited *only* that portion of the trial testimony that pointed toward McCleskey (J.A.133); it ignored both the strong contrary evidence and the District Court's express finding that the testimony was "conflicting." Similarly, the panel noted co-defendant Ben Wright's testimony that McCleskey had confessed to being the triggerman (J.A. 133); it ignored the District Court's finding that Wright's testimony was "obviously impeachable."

In sum, while the District Court found that the non-tainted evidence was severely compromised, the panel on appeal independently reweighed that evidence and found that it "presented a clear indication of McCleskey's guilt." (J.A. 135). Having thus substituted its own reading of the record for that of the District Court, the panel concluded that the State's introduction of Offie Evans' jailhouse confession was harmless error.[44]

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[44] The panel made several references to the opinion announced by the *en banc* Eleventh Circuit on Mr. McCleskey's initial federal habeas appeal. The District Court, on that first petition, granted habeas relief to Mr. McCleskey under *Giglio v. United States*, 405 U.S. 150 (1972), finding that Offie Evans had lied to the jury by failing to disclose that his testimony was being given in exchange for a promise from State officials. *McCleskey v. Zant*, 580 F. Supp. 338, 381-383 (N.D. Ga. 1984). The en banc Court of Appeals later reversed that judgment, finding that any *Giglio* violation had constituted harmless error. *McCleskey v. Kemp*, 753 F.2d 877, 884-885 (11th Cir. 1985) (en banc). While the panel below acknowledged that the en banc court's earlier holding "occurred in the context of McCleskey's *Giglio* claim" (J.A. 131), it nonetheless concluded that the prior holding "clearly has bearing on the import of Evans' testimony in the context of McCleskey's *Massiah* claim." *Id.*

Yet very different evidentiary consequences flow from findings of *Giglio* and *Massiah* violations. To correct a *Giglio* violation, if proven, would simply require the State in this case to inform any subsequent jury that, in addition to other evidence they should weigh in evaluating Offie Evans' testimony, they should know that Evans was testifying in exchange for a promise. To correct a *Massiah* violation, by contrast, would require the State to present its case without any use at all of Offie Evans' testimony concerning Warren McCleskey's jailhouse "confession." To confound the likely harm to Warren McCleskey from these very different outcomes is a serious error.

The panel also appears to rely on the en banc's court's earlier assessment of Evans' testimony in light of the other evidence presented to the jury. (J.A. 131-132). Since that court did not itself consider the possible impact of the total exclusion of Evans' testimony on the State's case, and since the parties did not argue that question to the prior *en banc* court, any dicta by that court should have carried little weight with the subsequent panel, and none with this Court.

C. The Obligations of Rule 52(a)

The panel's holding neglected this Court's repeated teachings about Rule 52(a). In *Amadeo v. Zant*, for example, the Court observed that

> [a]lthough there is significant evidence in the record to support the findings of fact favored by the Court of Appeals, there is also significant evidence in the record to support the District Court's contrary conclusion . . . We frequently have emphasized that '[w]here there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous.' Anderson v. Bessemer City, 470 U.S. at 574, citing United States v. Yellow Cab. Co., 338 U.S. 338 (1949), and Inwood Laboratories, Inc. v. Ives Laboratories, Inc., 456 U. S. 844 (1982). We reaffirm that stricture today.

486 U.S. at 225-226. The panel simply did not heed that caution.

Furthermore, as it reweighed the evidence, the panel improperly discounted the potent evidentiary impact of Evans' testimony. It followed the reasoning of the prior en banc court (see note 44 *supra*), finding that the impact of the confession was harmless, in large part, because it was "not developed at length" during the trial testimony. (J.A. 134). Yet the relative brevity of Evans' testimony did nothing to minimize its force. Evans' account – stressing not only McCleskey's ostensible admission that he was the triggerman, but his boast that he would have killed a dozen officers had it been necessary – need have been not a word longer to have seared into the jury's collective memory. Justice White recently underscored the profound impact which accounts of a defendant's confession can have upon a jury:

> "[T]he defendant's own confession is probably the most probative and damaging evidence that can be admitted against him. Though itself an out-of-court statement, it is admitted as reliable evidence because it is an admission of guilt by the defendant and constitutes direct evidence of the facts to which it relates. Even the testimony of an eyewitness may

> be less reliable than the defendant's own confession. An observer may not correctly perceive, understand, or remember the acts of another, but the admissions of a defendant come from the actor himself, the most knowledgeable and unimpeachable source of information about his past conduct." [*Bruton v. United States*, 391 U S. 123], 139-40 [1968] (White, J. dissenting). Confessions of defendants have profound impact on juries, so much that we held in *Jackson v. Denno* . . . that there is justifiable doubt that juries will disregard them even if told to do so.

Cruz v. New York, 481 U.S. 186, 195 (1987) (White, J., dissenting).

The panel also reasoned that there was "no reasonable likelihood that the jury's *sentencing verdict*, its decision to impose a death sentence, had been affected by Evans' testimony, in part, because "[t]he prosecutor did not introduce Evans as a witness at the sentencing phase." (J.A. 134). Yet, as we have noted, Offie Evans was the penultimate witness to take the stand at the guilt phase, and neither party presented additional evidence at the sentencing phase. Thus, Offie Evans' testimony was fresh in the jury's mind when it began its deliberations, both at the guilt phase, and at penalty.

Evans' testimony, indeed, played a singular role. Other State's witnesses either had not seen the shooting, or, like Ben Wright and Mary Jenkins, possessed a strong motive to twist the truth. As this Court noted recently in *Satterwhite v. Texas*, 486 U.S. 249 (1988), the testimony of a singular, disinterested witness on a critical issue at the penalty phase of a capital trial is rarely, if ever, harmless error. Offie Evans played just such a role for the State in Warren McCleskey's case.

The District Court's factfindings on the harmless error issue should not have been ignored by the panel, and the District Court's conclusion – that the State has not proven that its *Massiah* violation was harmless beyond a reasonable doubt – should be reinstated by this Court.

CONCLUSION

The judgment of the Court of Appeals should be reversed.

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Supreme Court, U.S.
FILED
SEP 7 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-7024

In The

Supreme Court of the United States

October Term, 1989

WARREN McCLESKEY,

Petitioner,

v.

WALTER D. ZANT, WARDEN,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF FOR THE RESPONDENT

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QUESTIONS PRESENTED

1.

Must the state demonstrate that a claim was deliberately abandoned in an earlier petition for a writ of habeas corpus in order to establish that inclusion of that claim in a subsequent habeas petition constitutes abuse of the writ?

2.

Did Petitioner abuse the writ by failing to pursue in his first federal habeas corpus petition a claim raised in his first state habeas corpus proceeding, particularly when counsel acknowledged he made a specific decision not to raise the issue in the first federal habeas corpus proceeding?

3.

Did the Eleventh Circuit Court of Appeals properly conduct a harmless error analysis and correctly find that any alleged constitutional violation was harmless beyond a reasonable doubt?

4.

Did the district court err both in finding a *Massiah* violation based on clearly erroneous factual findings and in failing to grant Respondent's motion for relief from judgment based on the subsequent availability of the testimony of Offie Evans?

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No. 89-7024

In The

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WARREN McCLESKEY,

Petitioner,

v.

WALTER D. ZANT, WARDEN,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF FOR THE RESPONDENT

STATEMENT OF THE CASE

In addition to the statement of the case set forth by the Petitioner, Respondent would add the following: Petitioner, Warren McCleskey, David Burney, Bernard Depree, and Ben Wright, Jr., were indicted on June 13, 1978, for murder and two counts of armed robbery. The Petitioner was tried separately beginning on October 9, 1978, and was found guilty on all three counts, and was sentenced to the death penalty and two consecutive life sentences. Petitioner's convictions and sentences were

affirmed on direct appeal. *McCleskey v. State*, 245 Ga. 108, 263 S.E.2d 146, *cert. denied*, 449 U.S. 891 (1980).

In the first state habeas petition filed by Robert Stroup on January 5, 1981, the Petitioner included a challenge to the alleged failure to disclose an "arrangement" with "a police agent or informer" (Offie Evans) and the alleged deliberate withholding by the prosecution of the statement made by the Petitioner to Evans. (J.A. 20-21). Petitioner subsequently filed an amendment to that state petition in which Petitioner challenged the introduction into evidence at trial of his statements to "an informer" and specifically asserted that the statements were taken in violation of the Sixth Amendment. (J.A. 22).

On December 30, 1981, the Petitioner filed a petition for habeas corpus relief in the United States District Court for the Northern District of Georgia. Among other allegations the Petitioner challenged the failure to disclose an "understanding" with witness Evans; however, Petitioner did not assert a Sixth Amendment violation in relation to the use at trial of the testimony of Offie Evans.

After extensive evidentiary hearings were held before the district court, on February 1, 1984, the court granted habeas corpus relief based on the allegation of an undisclosed deal with Offie Evans. *McCleskey v. Zant*, 580 F. Supp. 338 (N.D.Ga. 1984).

On January 29, 1985, the Eleventh Circuit Court of Appeals sitting *en banc* issued an opinion which affirmed all convictions and sentences, particularly reversing the district court on the *Giglio* claim as to the testimony of Offie Evans. *McCleskey v. Kemp*, 753 F.2d 877 (11th Cir. 1985) (*en banc*).

The Petitioner then filed a petition for a writ of certiorari in this Court. In that petition, the Petitioner asserted that the death penalty was discriminatorily applied, and that there was a violation of *Giglio v. United States*, 405 U.S. 150 (1972), based upon the testimony of Offie Evans. This Court subsequently granted the petition for a writ of certiorari limited to the consideration of the application of the death penalty. On April 22, 1987, the Court affirmed the denial of habeas corpus relief. *McCleskey v. Kemp*, 481 U.S. 279 (1987). On or about May 16, 1987, Petitioner filed a petition for rehearing in this Court. In that petition, Petitioner reasserted his claim relating to a violation of *Giglio v. United States*. On June 8, 1987, this Court denied the petition for rehearing. *McCleskey v. Kemp*, 482 U.S. 920 (1987).

On June 8, 1987, a successive state habeas corpus petition was filed raising several claims including the state's alleged failure to disclose impeaching evidence (the alleged "deal" with Offie Evans) at trial. On June 22, 1987, Petitioner filed an amendment to the petition raising two allegations, that is, that Offie Evans was acting as an agent for the state at the time the Petitioner made statements to Evans and that the prosecutor failed to correct alleged misleading testimony by Evans. Relief was denied on July 1, 1987.

On July 7, 1987, Petitioner filed a second federal habeas corpus petition in the United States District Court for the Northern District of Georgia. After hearings were held by the district court on July 8, 1987, July 9, 1987, and August 10, 1987, the district court entered an order on December 23, 1987, granting habeas corpus relief only as to Petitioner's murder conviction and sentence based

upon the finding of a violation of *Massiah v. United States*, 377 U.S. 201 (1964). (J.A. 63).

On May 6, 1988, Respondent filed a motion for relief from judgment under Fed. R. Civ. P. 60(b) in the district court. Pursuant to the June 17, 1988, order of the district court, both parties conducted discovery including taking the deposition of Offie Evans on July 13, 1988. On January 10, 1989, the district court denied the motion for relief from judgment. (J.A. 102).

A panel of the Eleventh Circuit Court of Appeals entered an opinion on November 22, 1989, amended on December 13, 1989, specifically reversing the finding of the district court and concluding that the district court abused its discretion by failing to find an abuse of the writ and that the Petitioner had abused the writ by deliberately abandoning the Sixth Amendment *Massiah* claim at the time of the first federal petition and that any error based on an alleged *Massiah* violation was harmless. *McCleskey v. Zant*, 890 F.2d 342 (11th Cir. 1989). (J.A. 112). The circuit court did not rule on Respondent's assertions that the district court's finding of a *Massiah* violation was based on clearly erroneous factual findings and that the district court erred in denying Respondent's motion for relief from judgment. Rehearing and rehearing *en banc* were denied on February 6, 1990.

Petitioner then filed a petition for a writ of certiorari in this Court which was granted on June 4, 1990, with a question being added by the Court. *McCleskey v. Zant*, ___ U.S. ___, 110 S.Ct. 2585 (1990). (J.A. 136).

STATEMENT OF FACTS

(a) The Commission of the Crime

The evidence presented at Petitioner's trial showed that on May 13, 1978, he and three coindictees committed an armed robbery at the Dixie Furniture Store in Atlanta, Georgia. The evidence showed that the Petitioner entered the front of the store while his three coindictees entered the back. Petitioner was positively identified at trial as one of the participants in the robbery. (T. 231-232, 242, 250).

While Depree, Burney and Wright, the coindictees, held several employees in the back of the store, the Petitioner was in front. Employee Classie Barnwell had activated a silent alarm, resulting in the arrival of Officer Frank Schlatt. Shortly after Schlatt entered the front of the store, he was shot. After hearing two shots, Wright observed the Petitioner running out of the front of the store. Wright, Depree and Burney ran out of the back. When they all arrived at the car, Petitioner stated that he had shot the police officer. (T. 658-659).

Petitioner testified in his own behalf at trial and stated that he knew Ben Wright and the other coindictees, but that he had not participated in the robbery. Petitioner relied on an alibi defense.

Petitioner was also identified at trial by two witnesses who had observed him take part in a prior similar robbery. Mr. Paul David Ross, manager of the Red Dot Grocery Store, also testified that during the course of the Red Dot robbery, his nickel-plated .38 revolver was taken.

On its rebuttal case, the state presented the testimony of Arthur Keissling, who identified the Petitioner as a participant in the robbery of Dot's Produce on March 28, 1978. (T. 887-889, 896).

The state also presented the testimony of Offie Gene Evans in rebuttal. Mr. Evans had been incarcerated in the Fulton County Jail in a cell located near the Petitioner and Bernard Depree. Evans testified that the Petitioner had talked about the robbery while incarcerated and had admitted shooting Officer Schlatt. (T. 869-870). Evans also testified that the Petitioner said he would have shot his way out even if there had been a dozen policemen.

(b) The Availability of the Statement of Offie Evans

The written statement of Offie Evans was not obtained by Petitioner until July, 1987. Even though the lower courts found counsel was "unaware" of the statement prior to that time, the record establishes counsel should have been aware of it and that the state did not "conceal" its existence.

The trial court conducted an in camera inspection of certain specified material noting in its order, "The court finds that although the documents might become material for rebuttal at trial, they are not now subject to discovery." (T.R. 46). During cross-examination of the Petitioner at trial, counsel for the Petitioner objected to cross-examination by the assistant district attorney indicating that he had asked for all statements by the Petitioner. The trial court stated, "He has a statement which was furnished to the Court but it doesn't help your client." (T. 830).

At the first state habeas corpus hearing trial counsel, John Turner, testified that the assistant district attorney, Russell Parker, told him there were two items not included in the file shown to Turner: the grand jury testimony of a witness and a statement of an unnamed individual. (S.H.T. 77).[1]

The deposition of the assistant district attorney, Russell Parker, was taken by Mr. Robert Stroup, counsel for the Petitioner, on February 16, 1981. During that deposition, Mr. Parker told Mr. Stroup that he "had a file I *made available* to all the defense counsel in this case." *Id.* (Emphasis added). Thus, the file identified at the deposition and requested by Mr. Stroup was the file *"that was made available* back at pre-trial and trial." *Id.* at 5. (Emphasis added). At no time is there any indication that this file included the matter which was the subject of the in camera inspection. This was the file given to habeas counsel subsequent to the deposition.

Additionally, during the deposition, Mr. Stroup, counsel for Petitioner, referred to a "statement" from Offie Evans. In response to a question concerning the statement, Mr. Parker clarified stating, "When you refer to a statement, Offie Evans gave his statement but it was not introduced at the trial. It was part of that matter which was made in camera inspection (sic) by the Judge prior to trial." *Id.* at 8.

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[1] The transcript of the first state habeas corpus proceeding was included as an exhibit in the first federal habeas corpus action. The district court took judicial notice of those records.

Petitioner obtained a copy of the statement, apparently from the Atlanta Police Department's file, pursuant to a request made under the Georgia Open Records Act, O.C.G.A. § 50-18-70 *et seq.*, for the first time in 1987.

(c) The Evidence Concerning the *Massiah* Claim.

Petitioner's statement of facts relies exclusively on the factual findings made by the district court which Respondent has continually asserted are clearly erroneous. In order to have a more complete view of the Respondent's position on the so-called *Massiah* violation, Respondent would note the following additional information contained in the record.

The evidence is fairly consistent that Offie Evans was arrested on or about July 3, 1978. Evans met with Russell Parker and two detectives from the Atlanta Police Department at the Fulton County Jail on July 12, 1978. The main facts in dispute are whether Evans was initially placed in the cell next to Petitioner or whether he was subsequently moved there and whether Evans was instructed to overhear conversations.

All state's witnesses testifying before the district court consistently denied that there was any request to move Offie Evans, that Offie Evans was ever instructed to obtain any statements from the Petitioner or to overhear any conversations of the Petitioner. Due to the belated presentation of evidence on this claim, the state was unable to present any documentary evidence on the actual location of Mr. Evans in the jail on any particular date as the records from 1978 were destroyed in the regular course of business. The record is replete with

references, however, revealing that Mr. Evans was placed in the cell next to Petitioner on the first day that Mr. Evans entered the Fulton County Jail.

At trial Carter Hamilton, a floor deputy on the first floor of the Fulton County Jail, testified that in July of 1978, the Petitioner was in jail cell 1 North 15. (T. 860). Offie Evans also testified at the trial that Petitioner was in the cell next to him at the Fulton County Jail. Evans testified that when he came into the jail he was placed in solitary confinement "straight from the street." (T. 873). When Evans was asked when he was moved, he responded that he was moved on August 14, 1978. (T. 881).

At the original state habeas corpus hearing Evans testified that he was placed in solitary confinement upon being taken to the Fulton County Jail and remained there "a little bit better than a month." Evans testified that while he was in solitary confinement he was adjacent to the cell of the Petitioner. (S.H.T. 116-117).

Russell Parker, the assistant district attorney who tried the case, testified at the original state habeas corpus proceedings that the first time he found out about Evans' testimony was from either Detectives Jowers or Harris who had apparently been contacted by Deputy Hamilton. Mr. Parker recalled specifically that he did talk to Evans at some time and talked to Evans at the Atlanta Police Department as well. Mr. Parker did not know Evans prior to that time and did not know of any instances when Evans had worked for the police department as an informant prior to the conversations being overheard. (Parker deposition at 15).

In addition to the above, the written statement of Offie Evans itself states, "I'm in the Fulton County Jail cell #1 North 14 where I have been since July 3, 1978 for escape." Thus, Mr. Evans himself in that statement indicates that he was in the cell next to the Petitioner on the first day Evans came to the Fulton County Jail.

The testimony of Mr. Parker before the district court establishes, as did his earlier testimony, that he had never known Evans prior to July 12, 1978, when he received information that an inmate at the jail had information about the case. (R4-130-1). Mr. Parker did not ask anyone to move Evans or ask Evans to overhear any conversations and never suggested that Evans do such. (R6-11). Mr. Parker testified that he did not ask Carter Hamilton or Ulysses Worthy to move Evans and it never came to his attention that any such request had been made.

Detective Welcome Harris testified that his first contact with Offie Evans was on July 12, 1987. He recalled going to the jail on that day with Russell Parker and with another detective that he thought was Detective Dorsey. Detective Harris based this recollection primarily on the notes of Mr. Parker. Detective Harris volunteered that he thought the interview occurred in Captain Worthy's office, but he was sure Worthy was not present. (R4-196).

Detective Harris did not know that Evans had been an informant prior to that time. His next encounter with Evans was on August 1, 1978. Detective Harris did not hear anyone tell Evans to keep his eyes and ears open and he did not tell Evans to do so. (R5-24). He was emphatic that he never asked anyone to move Evans, never asked Evans to overhear any conversations and

never suggested that Evans overhear conversations. He did not even recall Mr. Worthy being in the room during the interview, much less anyone making any such requests of Mr. Worthy.

Carter Hamilton testified before the district court and stated that Evans came in on an escape charge and would have been put in isolation as an escape risk. (R4-177). He did not have any conversation with Evans regarding the murder prior to July 11, 1978, and had no conversations with any detectives regarding the case prior to that date. He knew of no one that implied to Evans that Evans should listen to the Petitioner or talk with the Petitioner.

Hamilton recalled Detective Harris and Russell Parker coming to the jail along with another officer on July 12, 1978. (R4-182). Hamilton stayed in the room, but did not have a recollection specifically as to who the other detective was, although it could have been Detective Dorsey. He had no other specific conversations about the case with Evans during July of 1978.

To Hamilton's knowledge the first time anyone came to the jail to talk with Evans about the case was on July 12, 1978. Hamilton had no knowledge of Evans being moved and he recalled Evans being in isolation when Evans first came to the Fulton County Jail. Hamilton testified positively that no one asked to have Evans moved so that he could overhear conversations of the Petitioner, that Hamilton personally never asked Worthy to move Evans and that he did not tell Worthy that anyone wanted Evans moved. Further, during the interview on July 12, 1978, no one asked Evans to overhear conversations. (R6-76).

Officer Sydney Dorsey acknowledged that he knew Evans prior to this case and that Evans on occasion had been cooperative, but he had never gotten any information from Evans where Evans ended up testifying. (R5-54). He did not recall going to see Evans at the Fulton County Jail at the time of this case or at any other time and did not recall attending a meeting with Parker and Harris and Evans. He acknowledged that it was possible he had met with Evans on occasions during the investigation, but testified that had he made any promises to Evans, he would have had a specific recollection of that fact. *Id.* at 65. Detective Dorsey testified positively that he did not do anything directly or indirectly to encourage Evans to obtain evidence from the Petitioner and had no knowledge of anything of that sort occurring. He did not direct Evans to engage in conversations and never heard anyone else make such a request. He was positive that he made no request that Evans be moved and he did not ask Carter Hamilton to make such a request. (R6-81).

The testimony of Ulysses Worthy before the district court is so inconsistent, confusing and incoherent that one cannot discern readily any specific facts. Mr. Worthy initially testified that he recalled the murder of Officer Schlatt being brought up between Dorsey and Evans, but that he was not a participant in the conversation and he did not recall Dorsey asking Evans to listen for statements by the Petitioner. (R5-148). Subsequently, Mr. Worthy also testified that he did not recall Mr. Dorsey asking Evans to listen to the conversations of the prisoners. (R5-148). When asked whether he recalled if Evans was asked to engage in conversations, Worthy responded, "Seems I recall something being said to that effect to Mr.

Evans . . . but I'm not sure if it came from Mr. – from Detective Dorsey or who." *Id.* at 149. He testified that he was not sure and was not sure that Evans agreed to the arrangement.

Worthy recalled Russell Parker and Detective Harris coming out to interview Evans, but was not certain whether Detective Dorsey was present on that occasion. Mr. Worthy was finally asked if he recalled a request being made that "someone" be placed in a cell next to "someone else" so that he could overhear conversations and Worthy responded that he did. (R5-153). Mr. Worthy did not recall who made the request and thought Evans was placed in a cell next to the Petitioner. He did not recall when it was that he might have been asked to move Evans and he did not know of any conversations that Evans had overheard. *Id.* at 156.

At the second hearing before the district court, Mr. Worthy testified that the first time he recalled Evans ever being brought to his attention was when one of the deputies informed him that Evans had information to pass on to the authorities. Mr. Worthy was positive that Deputy Hamilton brought Evans to his attention. (R6-14). Worthy was certain that this was his first meeting with Offie Evans. Mr. Worthy recalled that investigators came to talk to Evans within a few days and to his knowledge this was the first time anyone had come to the jail to talk to Evans regarding the Schlatt murder. *Id.* at 17. Worthy specifically testified that after the meeting none of the investigators asked him to do anything.

Worthy subsequently testified that it was Hamilton that allegedly asked him to move Evans, but he was

uncertain as to who asked Hamilton to request that the move be made. Mr. Worthy emphasized that the first time he was ever asked to move Evans was on the day the officers came out to the jail with Mr. Parker to talk with Evans and that this was the only time he was ever asked to make such a move. Mr. Worthy contradicted all other witnesses and testified that Carter Hamilton asked that Evans be placed in a cell near the Petitioner. Mr. Worthy stated that he did not know for a fact that Evans was ever actually moved and he did not hear anyone ask Evans to listen to conversations. He was positive neither Harris, Dorsey, Jowers, nor Parker asked him to move Evans so that he could overhear conversations. *Id.* at 24. On this occasion, Mr. Worthy testified that the meeting with Dorsey was at the same time the other officers were there. Mr. Worthy later testified that he did not recall if Dorsey was present with Mr. Parker. Mr. Worthy was clear that he was not present at the meetings, that he simply understood the officers came back several times.

Mr. Worthy reiterated that the only encounter he had in which he was asked that Evans be moved was after the interview occurred when Dorsey and several other officers were there. He stated that Hamilton was the first one to ask that Evans be moved and reiterated that there was no meeting prior to the occasion when Parker and the officers came to the jail when anyone had been there to talk to Evans about the Schlatt murder. After the district court specifically reminded Mr. Worthy of the importance of the case, Mr. Worthy testified that there may have been other meetings when he was not present and did not recall being told of any other meetings. He again stated that when he was asked to place the Petitioner in a cell

was on the day when Mr. Parker was at the jail. He testified he was first approached by Carter Hamilton and did not know who asked Carter Hamilton to make the request. Mr. Worthy testified on this occasion that "the officer" did not directly ask him to make any move. (R6-65-6).

It should be noted that the district court for the first time in its final order determined that Evans had information not known to the general public. Respondent knows of no proof in the record that the facts set forth in Evans' statement were unknown to the general public nor were there facts in the statement that could not have been discovered by Evans through conversations with other inmates at the jail.

Further facts regarding this issue will be set forth as necessary during the subsequent portions of the brief.

SUMMARY OF THE ARGUMENT

In the context of an allegation of abuse of the writ, the state only bears the burden of pleading abuse. Once it has been pled, a petitioner always has the burden of proving that he has not abused the writ. Neither the applicable statutes nor the case law of this Court specifically limits the concept of abuse of the writ, but rather, it is left to the district and circuit courts to examine the cases as they arise to determine whether the facts of an individual case are sufficient to excuse the conduct in question. The standard of intentional abandonment, formally embodying the concept of a knowing and intelligent waiver with a knowledge of all pertinent facts,

does not apply to an abuse of the writ case. The requirement that a petitioner actually make that type of waiver has been replaced in most other contexts with a more objective standard and there is no reason not to make that same change in the abuse of the writ context. This will facilitate the purpose of the abuse of the writ doctrine so as to eliminate needless piecemeal litigation and would also assist in eliminating the delay inherent in capital cases.

The Eleventh Circuit Court of Appeals properly ruled that Petitioner had failed to prove he had not abused the writ. In determining that there was an abuse of the writ that Court did not create a new standard and did not ignore the jurisprudence of this Court. Rather, the Court examined the examples set forth in *Sanders v. United States*, 373 U.S. 1 (1963), and correctly concluded under the facts of this case that the district court erred in finding Petitioner had not intentionally abandoned his *Massiah* claim. When Petitioner acknowledged that he was aware of the claim and counsel even raised it in the first state habeas corpus proceeding but chose not to raise it in the first federal habeas corpus proceeding, this is a clear abandonment in the context of abuse of the writ and to rule otherwise would result in needless piecemeal litigation.

The Eleventh Circuit Court of Appeals in ruling on the abuse of the writ question also did not ignore factual findings made by the district court. Most of the findings cited to by the Petitioner are actually either questions of law or mixed questions of fact and law to which the clearly erroneous rule does not apply. The circuit court properly gave deference to all true factual findings but

disagreed with the ultimate legal conclusions reached by the district court. As noted previously, the circuit court correctly concluded that the issue in question was intentionally abandoned. Furthermore, the circuit court also examined counsel's actions in investigating the *Massiah* claim and found that the investigation simply was not adequate to excuse the abusive conduct. When counsel failed to interview the key personnel involved with Offie Evans both at the jail and during the investigation of the murder case and failed to attempt to obtain the jail records, even though he obtained records from the Atlanta Police Department and the prosecutor's office for purposes of proving his discrimination claim in the first proceeding, this is clearly insufficient to excuse the failure to raise the claim.

Even if this Court were not to find an abuse of the writ or not to find that the issue was intentionally abandoned, any alleged *Massiah* violation was clearly harmless beyond a reasonable doubt. The findings of the district court are not the type of findings to which the clearly erroneous rule applies as the district court was doing nothing more than examining the state trial transcript and making ultimate legal conclusions as to whether the issue was harmless. The question of malice was thoroughly proven by all of the other evidence presented at trial. The one statement of Mr. Evans regarding makeup did not contribute to the verdict and the identification of the Petitioner as the triggerman was supported by other overwhelming evidence presented at the trial of this case. Under the circumstances of this case, if the admission of the statement was error, it was clearly harmless beyond a reasonable doubt.

Respondent has at all times challenged the factual findings of the district court as being clearly erroneous. Although the Eleventh Circuit Court of Appeals did not need to reach this issue, Respondent submits that it is clear from a review of the record that the district court's view of the facts pertaining to the *Massiah* claim is simply implausible in light of the entire record in this case. If it is concluded that the *Massiah* issue is not an abuse of the writ, it will first be necessary as a threshold matter to rule upon the clearly erroneous issue or remand to the Eleventh Circuit Court of Appeals for a ruling upon this issue. Particularly, when a district court considering the codefendant's case has reached the exact opposite factual conclusion, Respondent submits that the findings by the district court in this regard are clearly erroneous.

Finally, Respondent also has challenged the district court's denial of Respondent's motion for relief from judgment. Again, prior to a ruling on the merits on the *Massiah* claim, this issue will need to be resolved by this Court or on remand to the Eleventh Circuit Court of Appeals. Respondent submits there was sufficient evidence presented to the district court as to the critical nature of the testimony of Offie Evans in relation to the *Massiah* claim, his unavailability at the time of the hearings in the district court and the materiality of his testimony based upon the deposition subsequently obtained from Mr. Evans to justify granting the motion.

ARGUMENT

I. THE PETITIONER BEARS THE BURDEN OF PROVING HE HAS NOT ABUSED THE WRIT BY THE INCLUSION OF A CLAIM IN A SUBSEQUENT FEDERAL HABEAS PETITION THAT WAS OMITTED FROM THE FIRST FEDERAL HABEAS PETITION.

In granting the instant petition for a writ of certiorari, this Court added a specific question for the parties to address which states as follows:

> Must the state demonstrate that a claim was deliberately abandoned in an earlier petition for a writ of habeas corpus in order to establish an inclusion of that claim in a subsequent habeas petition constitutes abuse of the writ?

McCleskey v. Zant, ___ U.S. ___, 110 S.Ct. 2585 (1990) (J.A. 136). Respondent asserts the state does not bear any burden of proof as to the question of abuse of the writ in a habeas corpus action and "intentional abandonment" is not the exclusive standard for review of allegations of abuse.

This Court has had numerous occasions to address the question of when subsequent applications for habeas corpus relief should be reviewed on their merits by the federal district courts. As early as 1924, the Court, while holding that *res judicata* would not extend to habeas corpus proceedings held, "[I]t does not follow that a refusal to discharge on one application is without bearing or weight when a later application is being considered." *Salinger v. Loisel*, 265 U.S. 224, 230 (1924). The Court also held that when a petitioner had a full opportunity to offer proof at a hearing on the first petition, good faith

required that he produce that proof at that time and not reserve it for a subsequent petition. *Wong Doo v. United States*, 265 U.S. 239, 241 (1924).

Although this Court had earlier noted that traditional notions of finality did not have a particular place in habeas corpus, *see Sanders v. United States*, 373 U.S. 1 (1963), this Court has more recently acknowledged the significant costs associated with habeas corpus in general and second petitions in particular. In *Engle v. Isaac*, 456 U.S. 107 (1982), the Court noted that the absence of finality frustrated the state's interest in deterrence and rehabilitation and that "[l]iberal allowance of the writ, moreover, degrades the prominence of the trial itself." *Id.* at 127. The Court was also concerned that the writ of habeas corpus could frequently cost society the right to punish admitted offenders. Furthermore, habeas corpus petitions, and in particular abusive petitions, place special costs on the federal system and result in increased federal intrusion into the state system. In death penalty cases in particular, this Court has expressed concern that "there must come an end to the process of consideration and reconsideration." *Sullivan v. Wainwright*, 464 U.S. 109, 112 (1983).

Petitioner's response to this Court's inquiry, as well as to the holding of the Eleventh Circuit Court of Appeals, seems to assert that legislative history binds this Court to a narrow view as to what conduct constitutes abuse of the writ. A review of this Court's holdings and the pertinent legislative history shows, rather, that habeas corpus and the particular concept of abuse of the writ have been fluid concepts evolving through the Court's litigation of particular factual situations. Petitioner has

sought to restrict this Court and its interpretation of the term "abuse of the writ" which term forms part of 28 U.S.C. § 2244(b) and Rule 9(b) of the Rules Governing Section 2254 Cases. In those enactments, however, Congress did nothing more than insert the "abuse of the writ" terminology to allow the courts the opportunity to address the question on a case by case basis and to allow the standard to evolve as it became necessary to address the question of abuse of the writ in differing factual settings. Certainly, in 1976, the problem of abusive petitions, particularly in the context of death penalty cases, was not the same as it is today. In fact, the legislative history specifically reflects a concern with abusive petitions and the everincreasing burden on the federal court system.

Even if Rule 9(b) and 28 U.S.C. § 2244(b) are considered to be a direct codification of the standard in *Sanders* with no allowance for a change in terminology, the Petitioner misreads the essence of the holding in *Sanders* itself.

In *Sanders*, the Court focused on the principles of equity noting, "A suitor's conduct in relation to the matter at hand may disentitle him to the relief he seeks." *Id.* The Court specifically then delineated *examples* of abusive conduct, and the clear reading of this portion of the Court's opinion shows that this was not an exhaustive list. These examples included, but were not limited to, deliberate withholding or abandonment as well as needless piecemeal litigation *or* collateral proceedings whose only purpose is to either vex, harass *or* delay. Thus, even if the rule and statute are deemed to be a direct codification of *Sanders*, the standard which is codified is itself

necessarily flexible and subject to interpretation by the courts as necessity arises.

The first prong of the question phrased by this Court focuses on the burden of proof. Clearly, since *Price v. Johnston*, 334 U.S. 266 (1948), the state has had the burden only of pleading abuse of the writ. Any burden of proof necessarily rests with the Petitioner. The Petitioner must prove that he has not abused the writ. By disproving intentional abandonment, the Petitioner does not necessarily carry his burden of proof as he must also prove that he has not otherwise abused the writ, including that he is not guilty of any inexcusable neglect or some other type of abuse. Petitioner must show that in spite of his conduct, there is some justifiable reason for having omitted a claim.

The second aspect to this Court's question focuses on whether, in order for conduct to be abusive, there must be an "intentional abandonment" as contemplated in *Fay v. Noia*, 372 U.S 391 (1963). Respondent submits that neither Rule 9(b), 28 U.S. § 2244, nor the cases decided by this Court requires such a restrictive interpretation of the concept of abuse of the writ. Since the time of *Fay v. Noia*, the Court has continually departed from the knowing and intelligent waiver standard with respect to proceedings occurring subsequent to trial and appeal. Although the knowing and intelligent waiver standard of *Johnson v. Zerbst*, 304 U.S. 458 (1938), may be appropriate to the question of pretrial waivers of counsel, the standard no longer has application to such things as procedural defaults occurring in state court proceedings and, by analogy, should not have a place in determining whether

an individual is barred from raising a claim in a subsequent federal petition which he did not include in his first petition.

With claims omitted from an initial petition, the focus should necessarily be on whether it is a claim of which the individual either was aware, or should have been aware, based upon the circumstances at the time. In this case, there is no doubt that the Petitioner was aware of the claim as he raised it in his first state habeas corpus proceeding and counsel made a specific decision not to present the claim in the first federal habeas corpus proceeding. This is a case in which counsel asserts he believed the claim lacked merit at the time of the first state habeas corpus petition. Respondent submits that this is precisely the type of conduct that the abuse of the writ doctrine is designed to prevent. The Eleventh Circuit Court of Appeals in a prior holding examining just this question held that "The question is whether the Petitioner knew of the possibility of making such a claim, not whether he believed that the claim itself was meritorious." *Booker v. Wainwright*, 764 F.2d 1371, 1377 (11th Cir. 1985). That Court concluded that "To excuse every petitioner who later raises a claim that he earlier believed lacked merit would be to carve out an exception for the very group of successive petitions targeted by *Sanders* and Rule 9(b) – those petitions lacking serious merit, brought only for the purpose of delay or vexation." *Id.* That Court also was seriously concerned with any requirement that there be a specific determination of whether a petitioner had "believed" the claim was insubstantial. "[A] factor in ascertaining that belief would be the apparent merit of the claim itself. The very purpose of

the abuse of the writ doctrine is to spare the judicial system the burden of exploring the merits of such claims." *Id. See also Gullett v. Armontrout*, 894 F.2d 308, 310 (8th Cir. 1990). Thus, the focus necessarily must be on the Petitioner's conduct, not his subjective belief as to the merits of the claim.

Petitioner does not question the fact that there is no longer a requirement that the Petitioner himself actually participate in the decision not to raise the claim, a concept formally embodied in the *Fay* standard. The only question is whether the concept of abandonment necessarily includes a knowing and intelligent waiver and includes a requirement that the Petitioner or his counsel have knowledge of all of the facts pertaining to the claim before he can be said to have abandoned the claim and abused the writ. Respondent submits that there is no such requirement in the case law of this Court or in the rules dealing with abusive conduct, nor does Petitioner cite to any law requiring such a standard.

The concept of abuse of the writ is designed to prevent needless piecemeal litigation and particularly to prevent delay in death penalty cases. To allow a petitioner to excuse conduct such as that presented in the instant case by simply denying he was aware of all possible information at the time he made a specific decision that a claim was not meritorious and he would thus forego its presentation, undermines the entire purpose behind the abuse of the writ doctrine. Under this standard, Petitioner would not even have to prove unawareness but simply deny awareness.

Respondent submits that it would be appropriate for this Court to further define the concept of abuse of the

writ to require that when one is aware of a legal claim to the extent that it is actually raised in state court prior to the first petition in federal court, the failure to raise that claim in the first federal habeas corpus action constitutes an abuse of the writ. A petitioner's attempt to prove that he did not make a knowing and voluntary waiver of the claim under the *Johnson v. Zerbst* standard should be insufficient to excuse such abusive conduct.

II. THE ELEVENTH CIRCUIT COURT OF APPEALS PROPERLY FOUND THAT PETITIONER HAD ABUSED THE WRIT BY FAILING TO RAISE A *MASSIAH* CLAIM IN HIS FIRST FEDERAL HABEAS CORPUS PETITION.

Petitioner specifically challenges the decision of the Eleventh Circuit Court of Appeals finding an abuse of the writ in relation to Petitioner's allegation of a violation of *Massiah v. United States*, 377 U.S. 201 (1964). Respondent submits that the circuit court properly found that the district court abused its discretion in not finding an abuse of the writ and that Petitioner had failed to prove that he had not engaged in abusive conduct by omitting an exhausted claim from his first federal habeas petition which was ripe for adjudication.

It is clear that the basis utilized by the Eleventh Circuit Court of Appeals for finding an abuse of writ is one that has been long recognized and accepted by this Court. In *Sanders v. United States*, this Court acknowledged that an abuse of the writ could be found for several reasons, including *as examples* a deliberate withholding of grounds at the time of filing the first application or a deliberate abandonment of grounds at the first hearing.

This serves one purpose of the abuse of the writ doctrine, that is, to eliminate needless piecemeal litigation. This Court has also held, "Successive petitions for habeas corpus that raise claims deliberately withheld from prior petitions constitute an abuse of the writ." *Woodard v. Hutchins*, 464 U.S. 377 (1984); *see also Antone v. Dugger*, 465 U.S. 200, 206 (1984) ("as applicant had presented each of these claims to the state court before the first petition for habeas was filed . . . applicant hardly can contend that these claims were unknown to him at that time").

Petitioner seeks to avoid a discussion of his own conduct in this matter by focusing instead on the conduct of the state and the perceived errors in the opinion of the Eleventh Circuit Court of Appeals. Neither the conduct of the state nor any part of the opinion of the court of appeals excuses Petitioner's abusive conduct.

Contrary to Petitioner's assertions, to affirm the decision of the Eleventh Circuit Court of Appeals, it would not be necessary to "repudiate" years of jurisprudence of this Court. Rather, the Eleventh Circuit Court of Appeals properly applied the abuse of the writ standard and examined this case as an individual factual situation and found the conduct of counsel in this case to be abusive. Neither *Sanders*, 28 U.S.C. § 2244(b) nor Rule 9(b) purport to set forth an exclusive listing of abusive conduct.

One of Petitioner's complaints about the opinion of the Eleventh Circuit Court of Appeals revolves around what Petitioner deems to be that court's ignoring of factual findings made by the district court. A review shows that the circuit court accepted the factual findings made by the district court, but simply and correctly did not

accept the legal conclusions reached. This Court has long recognized that the clearly erroneous rule of Fed. R. Civ. P. 52(a) does not apply to conclusions of law. *Pullman-Standard v. Swint*, 456 U.S. 273 (1982). Further, if the findings of the court rest on an erroneous view of the law, those findings may be set aside. There is no rule or principle that will always specifically delineate what issues are questions of fact, what issues are questions of law and what issues are actually mixed questions of fact and law. "A finding of fact in some cases is inseparable from the principles through which it was deduced." *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 501 n.17 (1984). *See also Fiske v. Kansas*, 274 U.S. 380, 385-7 (1927) (where "finding of fact and conclusion of law are so intermingled as to make it necessary, in order to pass upon the federal question, to analyze the facts.").

In a related context dealing with the presumption of correctness afforded to state court factual findings under 28 U.S.C. § 2254(d), this Court has also acknowledged this difficulty, but concluded that certain things such as the voluntariness of confessions, *Miller v. Fenton*, 474 U.S. 104 (1985), effectiveness of counsel, *Strickland v. Washington*, 466 U.S. 668 (1984) and conflict of interest, *Cuyler v. Sullivan*, 446 U.S. 335 (1980), are mixed questions of fact and law and not pure questions of fact. Similarly, the district court's findings in relation to the abuse of the writ questions were mixed questions of fact and law. The Eleventh Circuit Court of Appeals accepted the factual findings of the district court, but disputed the ultimate legal conclusions reached by the district court, which legal conclusions are not entitled to be reviewed under the clearly erroneous rule.

The Eleventh Circuit Court of Appeals disagreed with the district court, first of all in the district court's ultimate conclusion that the Petitioner could not be said to have intentionally abandoned the *Massiah* claim. The circuit court specifically found that this disagreement was based on the appropriate legal standard to be applied and the meaning of intentional abandonment and not on the underlying factual findings of exactly what occurred. It is clear that the ultimate meaning of abuse of the writ and deliberate abandonment are legal questions and not factual matters. Once the definitions are established, then the conduct of an individual would necessarily be a factual finding.

Petitioner also takes issue with the circuit court's resolution of the allegation of inexcusable neglect and the inquiry into the investigation conducted by counsel. Again, the circuit court of appeals acknowledged the district court's factual findings in regard to what counsel did, but disagreed with the conclusion as to whether the investigation by counsel was legally sufficient and adequate to excuse Petitioner's abusive conduct. This issue, similar to an issue of effective assistance of counsel, is an ultimate legal issue, not a factual one. What actions counsel took is a factual question, but the adequacy and reasonableness of that conduct is not.

As concluded by the Eleventh Circuit Court of Appeals, a review of the testimony presented to the district court shows that there is no question but that the issue of a *Massiah* violation was abandoned. There is no question but that the issue was raised in the first state

habeas corpus petition and was asserted in an amendment to that first habeas corpus petition. It is uncontroverted that Petitioner did not raise the claim in the first federal habeas corpus proceeding.

Ironically, the district court itself reached two different conclusions on the question of abandonment. The district court originally began the hearing by noting that the testimony of Offie Evans was absolutely true and the court had no doubt as to the guilt of the Petitioner. (R4-4). The court emphasized that *Massiah* had been decided at the time of the first federal petition, it was eminently clear that Evans was a cellmate of the Petitioner and that those facts alone would always raise the possibility of a *Massiah* claim. The court also noted the testimony at trial that Evans had talked to a deputy. The court specifically asked why there had been no previous inquiry as to when, if at all, Mr. Evans became an agent of the state. *Id.* at 5.

The court at the beginning of the hearing concluded as well that the Petitioner was aware that there was a written statement. *Id.* at 9. The court subsequently emphasized its decision noting that the fact that the Petitioner was housed in a cell next to Evans and that Evans allegedly cooperated with law enforcement officers should put counsel on notice to inquire when the alleged cooperation began. Counsel for Petitioner, Mr. Stroup, himself acknowledged that it did occur to him that there might be a *Massiah* claim just on those facts and that was the basis for his raising the claim in state court. (R4-31). The district court initially held that it was clear that Mr. Stroup thought about the issue at the state habeas corpus proceeding and gave up the issue. (R4-59).

The district court noted that even including the written statement of Offie Evans, there was still no evidence of any prior arrangement and that there was no evidence that Evans was an agent or informant when he was initially placed in the jail cell and no indication of an *ab initio Massiah* violation. *Id.* at 61. The court ruled that as to the *ab initio* claim, the Petitioner was no further along at the beginning of the hearings in the district court than when Mr. Stroup made the decision that he did not have enough information to pursue the claim. (R4-70). From a review of these facts and other statements at the hearing, it is clear the district court itself initially found an abandonment of this claim of an *ab initio Massiah* violation, but went on to allow a hearing to develop the question of whether a Sixth Amendment violation occurred subsequently based upon the fact that the evidence showed the authorities talked with Mr. Evans on one date and did not obtain a written statement until several weeks later. The court's focus at the hearing was first on what information was obtained by Evans between those two dates. It was not until after two days of allowing the Petitioner to engage in discovery in front of the court, which could have been conducted during the first federal habeas corpus proceeding, and upon hearing the testimony of Mr. Worthy, that the court apparently simply changed its mind. Thus, in its final order, the district court completely reversed its position and concluded that Petitioner could not be said to have intentionally abandoned the claim although the court acknowledged that the Petitioner did drop the claim before the first federal petition because it was obvious the claim could not succeed. (J.A.

83). The district court then, unsupported by any evidence, changed its position on another point stating that the statement of Offie Evans was a strong indication of an *ab initio* relationship.

The discrepancies that Petitioner finds between the district and circuit courts lies in the legal conclusion as to what constitutes intentional abandonment and not in the factual determination as to what counsel did or what counsel knew. The Eleventh Circuit Court of Appeals credited the district court's finding that counsel was unaware of the statement, even though that finding is arguably clearly erroneous. The Eleventh Circuit Court of Appeals properly found, however, that Petitioner had abandoned this claim. Respondent submits that the court of appeals properly inquired as to the actual conduct of counsel, the specific intentional decision to delete the claim, and found that this constituted abusive conduct.

The further question presented was whether counsel was guilty of inexcusable neglect or other abusive conduct by not obtaining the evidence in support of the *Massiah* claim at some earlier date. Again, the district court entered a ruling at the beginning of the hearing and then subsequently reversed itself. The district court specifically found for purposes of those proceedings that the Petitioner was aware that there was a written statement of Offie Evans. (R4-9). The court emphasized the circumstances of the case in making this determination. The court also discussed the investigation by counsel, after reading the affidavits submitted. The court noted that Petitioner gave no indication he had talked to the officers involved, or subpoenaed the jail records and did not bring the claim in the first federal habeas corpus action.

(R4-67). The court emphasized that counsel had not "touched every base" until he had examined the police officers who investigated the case and allegedly had contact with Evans and until the records from the jail had been subpoenaed. (R4-71). The district court did not go so far as to find inexcusable neglect, but did express concerns about the adequacy of the investigation prior to the decision to omit the claim from the first federal habeas corpus action.

After conducting the hearings and allowing Petitioner to go into the merits of the issues, the court concluded that there was no inexcusable neglect. The court stated that the "state made no showing that Petitioner or counsel should have known to interview Worthy." (J.A. 85). This and other statements indicate that the court improperly placed the burden of proof on the state in making its legal conclusions on inexcusable neglect rather than requiring Petitioner to prove that he had not abused the writ. The court also incorrectly concluded that this was not the same claim raised in the first state petition.

Again, the Eleventh Circuit Court of Appeals did not dispute the district court's factual findings of what Mr. Stroup did, but rather concluded that what he did was not sufficient to justify or excuse the conduct in question. The circuit court concluded that the unsuccessful investigation would not insulate the abandonment of the claim after that investigation.

Mr. Robert Stroup testified before the district court that he made some minimal effort to seek information on a potential *Massiah* claim in 1980. (R4-31-3). He specifically recalled amending the state habeas corpus petition

which he viewed as raising a claim of a violation of *Massiah*. He knew by the time of the state habeas corpus proceeding that Evans had testified in another case involving the same assistant district attorney. Mr. Stroup acknowledged that he at no time talked to Detectives Harris or Dorsey prior to or subsequent to the state habeas corpus proceeding and did not recall talking to Deputy Hamilton even though Hamilton testified at the trial. Mr. Stroup did not even seek to question Detective Dorsey after Offie Evans mentioned Dorsey's name in his state habeas testimony and mentioned that Dorsey said he would speak a word for him. According to Stroup he simply spoke with a "couple" of police officers from the Atlanta Bureau of Police Services in an attempt to develop evidence in support of the claim. He did not attempt to subpoena any jail records or talk to the pertinent people. As noted by the Eleventh Circuit, "Counsel apparently made no attempt to contact persons who clearly had contact with Evans and McCleskey at the Fulton County Jail." (J.A. 126 n. 12). No one disputes these facts; the dispute arises over the ultimate legal conclusion of whether what Mr. Stroup did was adequate to excuse his abusive conduct.

From a review of the above it is clear that the Eleventh Circuit Court of Appeals properly found that counsel's investigation was not adequate to excuse the failure to have presented the claim or evidence earlier. Counsel should have discussed the matter with persons connected with the case and with Mr. Evans specifically.

Petitioner seems to assert that counsel had no obligation to talk with Detectives Dorsey or Harris or Mr. Hamilton because now, almost ten years after the state

habeas corpus proceeding in which this issue was raised, these individuals deny any knowledge of any move of Offie Evans or agency relationship between Evans and the State. What these witnesses testified to at this late date has absolutely no bearing on counsel's obligation at the time of his initial investigation. Counsel had the obligation at the time to inquire of the appropriate individuals. Whether he would have received information is not the question. The critical question for resolution is the adequacy of counsel's investigation.

Petitioner also attempts to focus the Court's attention on the conduct of the state in an effort to divert attention from his own abusive conduct. Clearly, Petitioner is the one seeking to invoke an equitable remedy and has to overcome the equitable bar. Contrary to Petitioner's assertions, the state has at no time concealed anything or engaged in any bad faith conduct. It should be noted that the state at all times has disputed the district court's finding of a *Massiah* violation and has continually asserted that the district court was clearly erroneous in these findings. Furthermore, the state presented the statement in question to the trial court for an in camera inspection as is proper. At the state habeas corpus proceeding, Petitioner did not request this statement but requested the file which was made available to trial counsel for discovery purposes, not the entire prosecution and police files. Mr. Parker even told Mr. Stroup of the existence of the statement in his deposition. At the hearing in the district court on the second federal petition, the assistant district attorney turned over his entire files, including all work product and even matters totally unrelated to the *Massiah* claim. When counsel filed the Open Record

Act request, apparently with the Atlanta Police Department, the statement in question was turned over to counsel. Thus, the conduct of the state cannot be used as an excuse by the Petitioner for his failure to conduct a further investigation.

Furthermore, the written statement of Evans did not support the Petitioner's *Massiah* claim. The district court itself initially noted that the statement did not present any further evidence to substantiate an *ab initio Massiah* violation, although the district court contradicted that finding in its later written order. The written statement of Offie Evans does no more than indicate that Mr. Evans talked with the police on two different occasions, that Mr. Evans initiated the conversations with the Petitioner and apparently misrepresented his identity to the Petitioner. This provides no more support to Petitioner's *Massiah* claim than was clearly available at the time of the first state habeas corpus proceeding.

Any alleged support for Petitioner's *Massiah* claim comes solely from the testimony of Mr. Ulysses Worthy. Mr. Worthy has never been hidden from the Petitioner. In fact, Petitioner discovered his existence by a simple question directed to Detective Harris at the hearings before the district court. Detective Harris volunteered the information that Mr. Evans was interviewed in Mr. Worthy's office. Had the Petitioner asked that question of Detective Harris ten years ago, he no doubt would have given the same answer.[2]

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[2] Petitioner would then have known to interview Mr. Worthy and a hearing could have been held at a time when the jail

(Continued on following page)

Petitioner asserts that he abandoned his claim only after the "officials" testified under oath. Petitioner asserts that Mr. Parker was the superior of the police officers, which is incorrect, and asserts that the state officials have lied. It should be noted that prior to the district court hearing on the second federal habeas corpus petition, the only individual whose testimony under oath was even remotely related to the *Massiah* claim was Mr. Parker. Mr. Parker has never testified that he knew of any agency relationship between Evans and the state, and the district court did not find that Mr. Parker knew of any such relationship. No other state "official" testified in relation to this claim prior to the second federal habeas corpus petition and no other state official, who was called to testify, provided Petitioner with any information prior to the hearings in the district court. Petitioner's assertions that officials "lied under oath" can only refer to the testimony presented during the hearings in the district court in which witnesses contradicted the testimony of Mr. Worthy. Again, this subsequent testimony has no impact on the adequacy of Petitioner's initial investigation. Petitioner does not know what the witnesses would have told him in 1980 or 1981 solely because he did not ask. Therefore, Petitioner's assertion that the state has engaged in a ten year pattern of suppression, denial and perjury is clearly an inaccurate representation of the record before this Court.

(Continued from previous page)

records would still have been available and memories would have been fresh.

Therefore, it is clear that the Eleventh Circuit Court of Appeals was correct in its conclusion that Petitioner's initial investigation of the *Massiah* claim was inadequate to excuse his failure to have presented this evidence and raised the claim in the first federal habeas corpus proceeding. Thus, under either the standards of *Sanders v. United States* or under any modified standard this Court seeks to adopt, based on the inadequate investigation and the omission of the *Massiah* claim, the Eleventh Circuit correctly found that there was an abuse of the writ.

III. THE ELEVENTH CIRCUIT COURT OF APPEALS PROPERLY FOUND ANY ALLEGED *MASSIAH* VIOLATION TO BE HARMLESS.

Petitioner challenges the Eleventh Circuit Court of Appeals' finding of harmless error concerning the *Massiah* violation. Petitioner asserts certain "factual" findings by the district court in its harmless error analysis are entitled to be reviewed under the clearly erroneous rule, *citing Amadeo v. Zant*, 486 U.S. 214 (1988). Respondent submits the clearly erroneous rule does not apply to the harmless error question particularly when the district court ignored prior rulings by the *en banc* court and when any such "factual findings" were derived solely from the trial transcript and not from credibility determinations after an evidentiary hearing.

This Court has held that the clearly erroneous rule is not applicable where the dispute is "not so much over the elemental facts as over the constitutional significance to be attached to them." *Neil v. Biggers*, 409 U.S. 188, 193 n. 3 (1972). In this case, as in *Neil v. Biggers*, the Court is

examining "a habeas corpus case in which the facts are contained primarily in the state court record (equally available to us as to the federal courts below)" and where the hearings in the district court did not relate to the harmless error question. *Id. See also Napue v. Illinois*, 360 U.S. 264, 271-2 (1959) (Court examined facts on which constitutional claim rested, when question was whether false testimony in any reasonable likelihood affected the jury's verdict).

All so-called facts found by the district court in relation to the harmless error analysis are derived strictly from the trial transcript, not from any live testimony presented before the district court. In fact, the district court itself specifically ignored prior findings by the Eleventh Circuit Court of Appeals sitting *en banc*. Under these circumstances, there was no reason why the Eleventh Circuit Court of Appeals could not rely on its own prior opinion and rely on exactly what it observed from the trial transcript in making a harmless error analysis. The district court's statements that certain matters were testified to at trial did not amount to findings of fact, but were simply citations from the trial transcript. Any reviewing court can make similar citations to the existing record.

Specifically, Petitioner focuses on the purported finding by the district court that Offie Evans' testimony was "critical" to the state's case and the district court's purported findings that Ben Wright's testimony was "obviously impeachable." Petitioner ignores the fact that these were precisely the considerations of the Eleventh Circuit Court of Appeals sitting *en banc* upon review of the first federal habeas corpus action. It was this holding by the

Eleventh Circuit Court of Appeals that the district court in this case ignored in making its harmless error analysis. In fact, the Eleventh Circuit Court of Appeals did not state that it disagreed with the district court's finding as to Ben Wright's testimony, but did specifically disagree with the conclusion as to the nature of Offie Evans' testimony, relying on its prior holding. The clearly erroneous rule of Fed.R.Civ.P. 52(a) is inapplicable particularly when a question of whether the testimony of a given witness was "critical" is not a pure factual finding.

This Court has acknowledged that Sixth Amendment violations under certain circumstances may be subject to a harmless error analysis. *See United States v. Morrison*, 449 U.S. 361 (1981). The Eleventh Circuit Court of Appeals made a correct analysis of the harmless error question utilizing the standard of *Chapman v. California*, 386 U.S. 18 (1967).

Petitioner and the district court concluded that Evans' testimony was critical to establish that the Petitioner was the triggerman and to establish malice. This is based on testimony by Evans that the Petitioner admitted shooting the policeman, stated he wore makeup during the robbery and stated he would have shot his way out even if there had been a dozen policemen.

The Eleventh Circuit examined first the testimony of Offie Evans regarding Petitioner's admission that he was the triggerman. The Court noted that the state presented a substantial amount of circumstantial evidence relating to this aspect of the case, including Petitioner's own confession that he participated in the robbery. The evidence also showed that the officer was killed by the man

who entered the front of the store and the Petitioner was identified by two employees as the robber who came in the front door. The officer was killed by a .38 caliber Rossi and the state showed Petitioner had stolen a .38 caliber Rossi in an earlier robbery. Finally, evidence showed Petitioner carried a weapon with a white handle and an eyewitness saw a man run out the front door carrying a pearl-handled pistol. *McCleskey*, 890 F.2d at 352. The Court also noted that Ben Wright, the coindictee, also testified that McCleskey was the triggerman. The Court held that the other evidence at trial was such that the Court could conclude that any additional testimony by Offie Evans did not contribute to the verdict.

The Court also examined Mr. Evans' testimony relating to the assertion that the Petitioner was wearing makeup. This was examined by the panel as well as by the *en banc* court and was found not to be crucial to the state's case. This evidence supported the assertion that the Petitioner was the robber entering the front of the store. There was already testimony directly to this effect by Ben Wright as well as by two eyewitnesses to the crime and was corroborated by the Petitioner's own confession. Thus, this one aspect of the testimony also could reasonably have been said not to contribute to the verdict.

Finally, the other assertion relates to the testimony by Offie Evans that the Petitioner would have been willing to shoot his way out if there had been twelve policemen. Again, this particular piece of testimony, if erroneously admitted, was harmless beyond a reasonable doubt. As noted by the Eleventh Circuit Court of Appeals, this was not focused upon in the prosecutor's closing argument as

the prosecutor argued malicious intent based upon the physical evidence that the Petitioner shot the police officer once in the head and a second time in the chest as he was dying on the floor of the store, that the Petitioner could have surrendered but chose instead to kill the police officer, thus indicating malice, as well as arguing the one statement from Mr. Evans. Thus, the evidence pertaining to malice was overwhelming and the testimony of Offie Evans did not contribute to the verdict on malice murder. Furthermore, Mr. Evans did not testify at the sentencing phase of the trial and the testimony of Evans was not used by the prosecutor during his argument at sentencing to portray Petitioner as a malicious criminal, but rather, the prosecutor focused on the prior convictions of Petitioner.

As can be seen, this case is readily distinguishable from *Satterwhite v. Texas*, 486 U.S. 249 (1988), in which the critical testimony was from a psychiatrist. There this Court noted that the testimony was important because of the qualifications of the psychiatrist and because of the "powerful content of his message." *Id.* Contrary to *Satterwhite*, the testimony in this case did no more than corroborate other evidence already in the record and, thus, was harmless beyond a reasonable doubt.

Respondent therefore submits that even if there is no abuse of the writ found, any alleged *Massiah* violation was harmless beyond a reasonable doubt.

IV. THE DISTRICT COURT ERRED IN FINDING A VIOLATION OF *MASSIAH V. UNITED STATES* AND THE FINDING BY THE DISTRICT COURT TO THIS EFFECT IS CLEARLY ERRONEOUS IN LIGHT OF THE OVERWHELMING EVIDENCE TO THE CONTRARY.

Respondent has at all times contested the district court's conclusion that there was a violation of *Massiah v. United States*. Should this Court resolve the abuse of the writ issue adversely to Respondent, the issue of the clearly erroneous factual findings by the district court must then be resolved, or the case remanded to the circuit court for a determination of that issue.

Respondent asserted in the court below that certain findings by the district court are clearly erroneous under Rule 52(a) of the Federal Rules of Civil Procedure. Clearly, this Court may reverse any such factual findings where they are deemed to be clearly erroneous. "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948). Respondent would further submit that the district court's view of the evidence is "not plausible in light of the record viewed in its entirely." *Amadeo v. Zant*, 486 U.S. 214, quoting *Anderson v. Bessemer City*, 470 U.S. 564, 573-4 (1985).

The district court essentially resolved the agency question based upon the testimony of one witness, Ulysses Worthy. The Court believed only a small portion of Mr. Worthy's testimony, concluded that the rest of his testimony was obviously incorrect and disregarded the

testimony of the remaining witnesses before the district court. The court then created a scenario that the court believed plausible, but which is without evidence to support it. Respondent submits that based upon the entire evidence, the factual findings by the district court were clearly erroneous.[3]

Respondent submits that a review of the facts set forth *supra* and all of the evidence shows that the factual finding by the district court, in which the court finds that a request was made to move Offie Evans, is clearly erroneous. The further conclusion by the district court based upon this one factual finding that Evans was an agent has absolutely no support in the record. Mr. Worthy's testimony was "so internally inconsistent on its face or implausible that a reasonable factfinder would not credit it." *Anderson* at 575. Respondent submits that a review of all of the testimony and evidence shows that the district court was clearly erroneous in its factual finding regarding Mr. Evans and was also legally incorrect with regard to its final conclusion of a *Massiah* violation. Therefore, if this Court does not find an abuse of the writ, the finding by the district court to the contrary should be reversed or the case remanded to the Eleventh Circuit Court of Appeals for resolution of this issue.

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[3] It is pertinent to note that the coindictee's habeas corpus action was heard by a different district court judge who heard the same witnesses testify and who also considered the deposition testimony of Evans that Judge Forrester refused to consider. That court reached the exact opposite factual conclusion. See *Depree v. Newsome*, No. 1:85-CV-3733-RLV (N.D. Ga. July 10, 1990). (Appendix to Respondent's brief).

V. THE DISTRICT COURT ABUSED ITS DISCRETION IN DENYING RESPONDENT'S MOTION FOR RELIEF FROM JUDGMENT.

Respondent also submits that if this Court concludes that the district court did not err in failing to find an abuse of the writ and was not clearly erroneous as to its factual findings as set forth above, then Respondent submits that the case should be remanded for a resolution of the challenge to the district court's denial of Respondent's motion for relief from judgment.

The Respondent's motion was filed to seek to include the testimony of Offie Evans, who did not testify originally before the district court. Upon discovering the availability of Mr. Evans, Respondent filed an appropriate motion seeking relief from judgment under Fed.R.Civ.P. 60(b)(2) and (6).

The deposition of Offie Evans was taken and other documents were submitted to the district court. The district court denied the motion for relief from judgment finding that insufficient cause had been shown under Rule 60(b) to justify the granting of such relief. Respondent submits that this was an abuse of discretion by the district court.

In filing the motion with the district court, the Respondent recognized that the testimony of Mr. Evans did not fit within the traditional definition of newly discovered evidence as Mr. Evans was previously known to be a critical witness and there was some indication from the record that Evans would testify contrary to what had been presented at the district court hearing. Mr. Evans was not available to testify before the district court

and, under those circumstances, it should be deemed to be newly discovered under Rule 60(b)(2), or should have justified relief from judgment under Rule 60(b)(6) permitting judgment to be set aside for "any other reason justifying relief from the operation of a judgment."

Contrary to the assertions of the district court, if the evidence of the testimony of Evans was properly considered and proper credibility findings were made, the evidence is such that a new trial would probably produce a new result. The district court chose to ignore its own earlier statements that Evans' written statement to the authorities was credible and that Mr. Evans would be a credible witness and concluded that Mr. Evans would have some reason for lying due to the fact that he would not want to be known as an informant. This conclusion is unwarranted as the mere fact that Mr. Evans testified in the trial of the Petitioner's case establishes any danger with which Mr. Evans would be concerned. With Mr. Evans testifying directly contradictory to the only witness truly credited by the district court and when that one witness gave such an implausible version of events, and when Mr. Evans' testimony corroborates the testimony of other witnesses and provides a logical chain of events that occurred, then it seems quite likely if Mr. Evans' testimony were appropriately considered, a different result *should* be produced.[4]

Even if the district court did not abuse its discretion in concluding that the requirements of Rule 60(b)(2) had

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[4] As noted previously, that is precisely what happened when a different district court judge considered the coindictee's case, including the deposition of Offie Evans.

not been met, Respondent submits that this case then falls squarely within the parameters of Rule 60(b)(6), providing for the granting of such relief for "any other reason justifying relief from the operation of the judgment." Under the unusual circumstances of the instant case, the availability of Mr. Evans would justify the granting of relief from judgment.

This Court has recently considered Rule 60(b)(6), noting, "The rule does not particularize the factors that justify relief, but we have previously noted that it provides courts with authority 'adequate to enable them to vacate judgments whenever such actions are appropriate to accomplish justice,' (cite omitted), while also cautioning that it should only be applied in 'extraordinary circumstances.' (Cite omitted)." *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, (1988). *See also Klapprott v. United States*, 335 U.S. 601, 615 (1949). Respondent submits that under the circumstances of this case, the granting of relief under Rule 60(b) is appropriate. The district court seemed to conclude that the granting of such relief was not appropriate as there was no conclusion that the denial of the motion would result in an extreme hardship to the Respondent. This completely ignores the fact that the district court had granted habeas corpus relief in this action resulting in the necessity of a new trial by the state years after the original trial was completed, requiring extensive efforts to relocate evidence, witnesses, and prepare a case for trial when, with the granting of the motion, such extreme hardship might not result.

Under the circumstances of this case, Respondent submits that justice virtually dictated the granting of the

motion for relief from judgment and, therefore, the district court's failure to do so was clearly an abuse of discretion.

CONCLUSION

For all of the above and foregoing reasons, Respondent prays that the judgment and verdict of the Eleventh Circuit Court of Appeals be affirmed, or that the case be remanded to that court for a consideration of the two issues left undecided.

Respectfully submitted,

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APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

BERNARD DEPREE,	:	
Petitioner,	:	CIVIL ACTION
vs.	:	
LANSON NEWSOME,	:	No. 1:85-cv-3733 -RLV
Respondent.	:	

ORDER

Bernard Depree was indicted in the Superior Court of Fulton County, Georgia, on June 13, 1978, along with David Burney, Jr., Warren McCleskey, and Ben Wright for two counts of armed robbery and the murder of police officer Frank Schlatt. Warren McCleskey was tried separately from the other co-defendants and received a death sentence. DePree was tried jointly with Burney and was found guilty of murder and two counts of armed robbery. On November 20, 1978, Depree was sentenced to life imprisonment on each count to be served consecutively.

DePree's convictions and sentences were affirmed by the Supreme Court of Georgia, Depree v. State, 246 Ga. 240 (1980). His petition for a writ of habeas corpus was denied by the Superior Court of Tattnall County, Georgia, and on May 1, 1985, the Supreme Court of Georgia denied Depree's application for a certificate of probable cause.

DePree filed a petition for a writ of habeas corpus in this court, which was denied; DePree then filed a notice of appeal to the Eleventh Circuit. Subsequently, because of developments in Warren McCleskey's habeas corpus

proceedings, DePree filed a motion with the Court of Appeals asking for a conditional dismissal of the appeal and a mandate to the district court to reopen the proceedings to allow the taking of additional evidence. On August 10, 1987, the Eleventh Circuit entered an order remaining [sic] the case to it so that this court could pass on DePree's *Massiah* claim. Massiah v. United States, 377 U.S. 201 (1964). The Court of Appeals subsequently expanded the scope of its remand order by allowing the petitioner to present a *Giglio* claim also. Giglio v. United States, 405 U.S. 150 (1971).

This court initially delayed in acting on the Eleventh Circuit's remand order, awaiting the outcome McCleskey's habeas proceeding. However, because Judge Forrester had made certain credibility choices with respect to the testimony offered in McCleskey's habeas corpus proceedings, this court determined that it was necessary for it also to conduct an evidentiary hearing in which it could weigh the credibility of the witnesses and make its own determinations with respect to such credibility. Therefore, this court heard evidence on September 5 and 6, 1989, and allowed DePree and the State to submit post hearing briefs. The matter is now ripe for a determination of the issues which this court has before it as a result of the remand from the Eleventh Circuit.

In Massiah v. United States, 377 U.S. 201, 84 S. Ct. 1199 (1964), the Supreme Court held that the Sixth Amendment right-to-counsel provision precluded the use of a defendant's incriminating statements obtained through a police informant after the defendant had obtained counsel. In arguing that *Massiah* requires that his conviction and sentence be set aside, DePree contends

that Offie Gene Evans and Howard Smith were acting as police informants when they overheard or elicited incriminating statements from him.

Offie Evans was arrested on July 3, 1978, and taken to the Fulton County Jail. On July 12, 1978, Evans met with Russell Parker, the assistant district attorney prosecuting the Frank Schlatt murder case, and two detectives from the Atlanta Police Department at the Fulton County Jail. At this time Evans recounted various incriminating statements made by both McCleskey and DePree with respect to the murder of Officer Schlatt. Evans later signed a written statement on August 1, 1978. Mr. Parker testified that Evans did not tell him anything different on August 1 than he had on July 12.

Mr. Parker, Detective Welcome Harris, Officer Sidney Dorsey, and Deputy Sheriff Carter Hamilton all denied that they ever requested that Evans be placed in a cell next to Warren McCleskey or that he attempt to obtain any incriminating statements from McCleskey or DePree. Evans himself testified upon being arrested and taken to the Fulton County Jail he was immediately placed in Cell 1 North 14 (*i.e.*, Cell No. 14 on the first floor of the North wing); McCleskey was in the adjoining cell, 1 North 15, and Depree was in the cell immediately over DePree, 2 North 14. Evans further testified that he was never moved from his original cell during the time he was incarcerated at the Fulton County Jail.

Evans testified that a deputy sheriff, whose name he could not recall, had apparently overheard conversations going on in the cell block and suggested to Evans that he might have obtained information that the police would be

interested in; Evans testified that when the deputy sheriff asked if he would be willing to talk to the police about those conversations, Evans agreed to do so. Carter Hamilton testified, however, that Evans approached him, stating that he had information regarding Officer Schaltt's murder although Evans gave no specifics at that time; Hamilton informed Evans that he would put him in touch with the police and that within a day or two of the conversation Deputy Hamilton arranged for Mr. Parker and two detectives to come to the jail.

The only testimony supporting DePree's allegation of a *Massiah* violation comes from Ulysses Worthy, who was captain of the day watch in charge of the jail in 1978. Captain Worthy testified twice during the McCleskey hearings, on July 9, 1987, and again on August 10, 1987. On July 9, Captain Worthy testified that he recalled a meeting between Evans, Detective Dorsey, and, possibly, another person. Captain Worthy testified that, although he was not a participant in this meeting, he was present part of the time. When asked if he recalled whether Detective Dorsey asked Evans to listen to what he heard at the jail from those who may have been near him, Captain Worthy replied, "No, sir, I don't recall that." In response to further questions, however, Captain Worthy seemed to equivocate.

Q Do you recall whether he asked him to engage in conversations with somebody who might have been in a nearby cell?

A Seems I recall something being said to that effect to Mr. Evans.

Q Okay.

A But I'm not sure that it came from Mr. – from Detective Dorsey or who.

Q In other words, somebody present in that conversation said that but you're not certain whether it was Mr. Dorsey or perhaps his partner or somebody else there?

A I'm really not sure.

Q Okay. Did Mr. Evans, to your recollection, agree that he would do that?

A I'm not sure.

(Tr. 148-49).

On July 9, Captain Worthy also testified he had been requested to move Evans to a cell near McCleskey:

Q Mr. Worthy, let me see if I understand this. Are you saying that someone asked you to specifically place Offie Evans in a specific location in the Fulton County Jail so he could overhear conversations with Warren McCleskey?

A Yes, ma'am.

Q When was that request made and by whom?

A I don't know exactly who made the – who asked for the request but during this particular time there was several interviews of Mr. Evans by various officers.

Q All right. And –

A And the exact one that asked that request be made, I really can't say now. I really don't know.

Q All right. Now, so you're saying they did – they wanted Mr. Evans to go in and serve as a listening post? Is that what they asked you to do?

A Well, they asked that he be placed near Mr. McCleskey.

Q Was that when Mr. Evans first came into the jail?

A I'm not sure whether that was when he first came in or not. I'm not sure.

(Tr. 153-55).

On August 10, 1987, during the McCleskey habeas proceeding Captain Worthy testified that the first instance in 1978 in which Evans was brought to his attention was when Carter Hamilton brought him down to his office and stated that Evans wanted to call either the district attorney's office or the police department because he had some information he wanted to pass on to them. (Tr. 14). Captain Worthy then testified as follows:

Q To your knowledge, when was the first time that Evans was interviewed at the Fulton County Jail by the investigators on the Schlatt murder?

A The exact time or date I don't recall that.

Q All right. Why don't we do this: In relation to the meeting that you had in your office with Carter Hamilton and Offie Evans when Hamilton asked you for permission to call the investigators, approximately how long thereafter did the investigators come out to the jail and talk to Offie Evans?

A To my knowledge, it was a matter of a few days.

Q All right. Now, to your knowledge, when they came out in a matter of a few days, to your knowledge, was this the first time that the investigators ever came out to talk to Offie Evans about the Schlatt murder?

A To my knowledge, yes.

Q All right. Now, where did this meeting take place?

A In my office.

. . . .

Q All right. Did you go over and join them?

A Join them?

Q Yeah, did you join them?

A Not really, no.

Q Okay. Did any of them ever make – did any of them make a request of you at that time? Did they ask you to do anything, the officers?

A Not that I can recall.

Q All right. Were you ever asked to move Offie Evans from one cell to another?

A Yes, sir, I was.

Q Who asked you to make this move?

A I'm not sure, but it would have to be – to have been one of the officers, either Carter Hamilton or it might have been Offie Evans. I'm really not sure at this point.

. . . .

A It was, oh yeah, I believe it was Carter Hamilton. I believe it was Carter Hamilton that asked.

Q All right. So Carter Hamilton asked you to move Offie Evans?

A Right.

Q Now, what did you do in response to Carter Hamilton's request to move Offie Evans?

A Well, after he explained why he wanted him moved, I gave him permission to do so.

Q Okay. Now, when did he ask you to move Offie Evans in relation to the interview with the investigators?

A The same day of the interview.

. . . .

Q Now, this request by Carter Hamilton, was this the only time you were asked to move Offie Evans?

A Yes, sir.

(Tr. 16-19).

On September 5, 1989, at the evidentiary hearing conducted in the instant case Captain Worthy testified as follows:

Q Had it ever come to your attention [that Evans] knew anything in particular about the Schlatt murder case and the furniture store robbery before Mr. Hamilton brought it to your attention?

A No, I never discussed anything like that with him.

Q The first time you knew of that would be on July 11, 1978?

A If that is when Mr. Hamilton brought it to my attention.

Q And in the meeting, then there was a meeting at the prison; is that correct, shortly thereafter in which Mr. Parker and other people came and talked to Mr. Evans?

A There was a meeting at the jail.

Q Do you recall how long after Mr. Hamilton talked to you that that occurred?

A I really don't know. I don't know exactly how long it was afterwards.

Q If there was some indication someone came to the jail on July 12, 1978, would you disagree with that date?

A No, I couldn't disagree.

Q Now, is it correct that no one asked you to move Mr. Evans until after that meeting took place at the jail?

A It was after the meeting that they asked.

Q To clarify for the moment, the meeting I am talking about is when Mr. Parker came out to the jail and two other detectives came out after Mr. Hamilton had talked to you, that's the meeting I'm talking about. Ha[d] anybody asked you to move Mr. Evans before that meeting took place?

A No, not to my knowledge.

Q Now, except for that particular meeting, were you ever present in the room when anyone talked to Mr. Evans about the murder of Frank Schlatt in that furniture store robbery?

A No.

Q Mr. Worthy, you did not ever actually see Offie Evans moved from one cell to another?

A No, I did not see him moved from one cell to another.

. . . .

Q Now Mr. Worthy, to your knowledge, isn't it true that Mr. Evans was not moved from the time he was brought in the Fulton County Jail in the early part of July until the day he had that meeting with Mr. Parker and the detectives?

A To my knowledge, Offie Evans was moved after the meeting.

Q You don't know for a fact that he was moved? You said you didn't see him moved; is that correct?

A I did not see him moved but the request came to me from one of the officers at the jail asking that he be moved.

Q When did that take place?

A After the meeting with the detectives.

. . . .

Q Now, did you ever hear anyone tell Mr. Evans to listen to conversations of Bernard DePree or Warren McCleskey?

A No, I didn't.

(Tr. 1-57 through 1-60).

This court finds Captain Worthy's testimony to be inherently contradictory and not credible. It is uncontradicted that Evans was already in the cell next to Warrer McCleskey prior to the July 12 meeting with Mr. Parker and two detectives; otherwise, it would have been impossible for Evans to have relayed the content of any conversations he had had with McCleskey to Mr. Parker at that meeting. Nevertheless, Captain Worthy has testified on numerous occasions that the purported request to move Evans did not take place until after that meeting.

This court does not impute any sinister motive to Captain Worthy; the court simply notes that the events to which Captain Worthy testified occurred approximately ten years ago and that Captain Worthy had no notes or other documents to refresh his recollection of the events which occurred in July 1978. The court does note that there was testimony that prisoners who were considered an escape risk were housed in the north wing of the Fulton County Jail. Since Offie Evans was arrested as an escapee from a federal halfway house, it would have been standard procedure for him to have been housed in a single cell in the north wing of the jail. Captain Worthy's memory of a request to move Evans may simply have been the result of Evans' being described as an escape risk and a request that he be housed in the north wing. This court chooses to believe the testimony of Evans, Mr. Parker, and all other persons (except Captain Worthy) who unequivocally testified that Evans was originally placed in Cell 1 North 14, was never moved to another cell which he was incarcerated at the Fulton County Jail, overheard conversations between McCleskey and DePree and reported the substance of those conversations to the police and the district attorney's office, and was not acting at the behest of the police which he engaged McCleskey and DePree in conversation and reported the substance of such conversations to the police.

DePree also relies upon the testimony of Howard Smith to support his claim of a *Massiah* violation. Smith is a seasoned felon who in August 1978 was incarcerated in the Fulton County Jail, charged with escape and auto theft. While in the Fulton County Jail, Smith was housed in a cell with DePree and one other inmate.

Smith had his sister contact the Atlanta Police to tell them that he had information regarding Officer Schlatt's murder. His sister apparently called the police because a detective came to the jail and interviewed Smith. Smith was interviewed on at least two other occasions and gave written statements. The only part of Smith's testimony even hinting at a *Massiah* violation is as follows:

> Q What were you trying to – why were you asking those questions [to DePree]?
>
> A Well, the reason I was asking him the questions, because I was told to find out more information from him about what happened.
>
> Q And who told you to find out more information about what happened?
>
> A Mr. Harris.

(Tr. 1-17).

This court does not view this statement by Detective Harris, even if accurately recalled by Smith, as sufficient to convert Smith's status to that of "police informant" so as to invoke *Massiah*. Since Smith had initiated the contact with the police and had already relayed the substance of the information he had gathered from DePree, it is obvious that the statement by Detective Harris is little more than to the effect, "If you learn any more information, please let us know." This court holds that such encouragement given to an inmate is insufficient to invoke *Massiah*.

For the foregoing reasons, this court holds that DePree's Sixth Amendment right to counsel, as enunciated in *Massiah*, was not violated when Evans and Smith testified against him at his trial.

In Giglio v. United States, 405 U.S. 150, 92 S. Ct. 763 (1972), the Supreme Court held that evidence which reflects on the credibility of witnesses must be disclosed to a defendant. In the instant case, DePree argues that promises were made both to Offie Evans and Howard Smith and that these promises were not disclosed to defense counsel.

Although Evans undoubtedly hoped to gain something by revealing to the police the statements he had overheard by McCleskey and DePree (this court doubts that many felons "snitch" on other felons merely out of any sense of civic obligation), there is no credible evidence in the record to suggest that any promises were made to Evans to elicit his testimony. Indeed, even if one of the police officers or the assistant district attorney had promised to "speak a word" in Evans' behalf in his own case, this court holds that in the instant case such a statement did not have to be disclosed pursuant to *Giglio*. Indeed, in McCleskey's case, the Court of Appeals assumed that such a statement had been made and stated, "The detective's statement offers such a marginal benefit, as indicated by Evans, that it is doubtful it would motivate a reluctant witness, or that disclosure of the statement would have had any effect on his credibility. The State's non-disclosure therefore failed to infringe McCleskey's due process rights." McCleskey v. Kemp, 753 F.2d 877, 884 (11th Cir. 1985) (*en banc*). This court holds that DePree has failed to present sufficient evidence to show a *Giglio* violation with respect to Evans.

Howard Smith testified before this court that Detective Harris and Russell Parker both told him not to worry and that they would take care of him. He stated that no

other promises were made other than that he would be taken care of. Both Detective Harris and Mr. Parker testified that they could not recollect having made any promises whatsoever to Smith.

Again, this court does not believe that Smith testified against DePree out of a sense of civic obligation. As a seasoned felon, Smith undoubtedly hoped that his cooperation would result in more favorable treatment. However, this court holds that the marginal statements purportedly made by Detective Harris and Mr. Parker were not of such a nature that, under the circumstances of this case, they had to be disclosed to defense counsel at DePree's trial. (Indeed, Mr. Parker testified that there could have been no deals made with Smith regarding his testimony in DePree's case because the term of court at which Smith had been sentenced had already passed at the time he testified at DePree's trial, and under state law, a sentence cannot be changed once the term of court has passed.)

For the foregoing reasons, this court holds that no promises were made to Smith that were required to be disclosed to DePree under *Giglio*.

DePree also asserts that his Fifth and Fourteenth Amendment rights were violated when the state failed to correct perjured testimony at the trial. This allegation is based upon Evans' testimony at DePree's trial that DePree "hoped that Ben [Wright] was going to get caught before they go to court, because he might would tell them how that thing went down, and he said that he hoped that nine out of ten in the case of Ben they were going to kill him anyway." (Trial transcript 966-67). DePree argues

Evans had previously claimed that this statement was made by McCleskey not DePree. However, Evans' trial testimony is consistent with the statement he signed on August 1, 1978, in which he said:

> DuPreee [*sic*] and McClesky [*sic*] started talking again saying "[*sic*] that they hoped that enough heat was on Ben, so that they would [*sic*] Ben when they ran down on it, and if they dokill [*sic*] him, it would be better in their favor because he know that Ben was mad about them pointing the killing at him, because they know that Ben would go and tell the truth to keep from getting tied up in that murder. DePree [*sic*] told McClesky [*sic*] 9 times out of 10 they are going to kill him any way because Ben wasn't as smart as he thought he was. . . .

The only thing in the record even remotely hinting that DePree has changed his testimony is a copy of Mr. Parker's notes which he prepared as an aid in his closing argument. On those notes his comment that DePree had told McCleskey that nine times out of ten they were going to kill Ben anyway has been stricken through and a notation has been made by the assistant district attorney assisting Mr. Parker to the effect that Evans now says McCleskey made the statement. This handwritten notation shows nothing more than that Mr. Parker's assistant recalled Evans' trial testimony differently than what actually occurred. Other than this notation, there is no evidence in the record that Evans ever testified that the statement was made by McCleskey rather than DePree. The court finds this argument to be totally without merit.

For the foregoing reasons, this court finds that DePree has stated no grounds which would entitle him to

a writ of habeas corpus. The clerk is directed to transmit to the Court of Appeals a copy of this order together with the record that has been compiled since the order of remand from the Eleventh Circuit.

SO ORDERED, this 10th day of July, 1990.

/s/ Robert L. Vining, Jr.
ROBERT L. VINING, JR.
United States District Judge

Supreme Court, U.S.
FILED
OCT 12 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-7024

In The

Supreme Court of the United States

October Term, 1990

WARREN McCLESKEY,

Petitioner,

vs.

WALTER D. ZANT, SUPERINTENDENT, GEORGIA DIAGNOSTIC & CLASSIFICATION CENTER,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

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This is petitioner's reply to the Brief for the Respondent (hereinafter "the State") and the Brief Amicus Curiae of the Criminal Justice Legal Foundation (hereinafter "the Foundation").[1] Although these two briefs adopt different approaches, their pages share a common thread: the desire to divert this Court's attention from the factual findings of the District Court, and from the settled legal significance of those facts.

The State urges this Court to reconstitute itself as a *nisi prius* tribunal: to ignore the District Court's findings, indeed to ignore even findings by the Court of Appeals that displease the State, and to reweigh the credibility of each witness for itself. The Foundation's approach is different. Rather than dwell upon the facts, it urges the Court to reconstitute itself a legislative tribunal. Dismiss the common law heritage, it argues; "[t]oday's writ . . . is a different procedure with a different purpose." (Fnd. Br. 3). Forget or distort this Court's prior federal decisions; they are distinguishable, or like *Fay*, "a dead letter." The Court's leading precedent, *Sanders v. United States*, is mere "dictum . . . hitched . . . to a broken post," (Fnd. Br. 26); Congressional intent, no more than "murky waters" where the Foundation finds very "little light." (Fnd. Br. 22). This approach is, of course, a siren's song: attractive but fatal. It calls on the Court to abandon its judicial role in habeas cases.

In this reply, we will first undo the State's chief mischief – its attempt to obscure and disparage the factual findings made by the District Court. Two principal areas deserve attention: (i) the District Court's findings in support of a *Massiah* violation; and (ii) the District Court's findings on petitioner's efforts to uncover that

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[1] Each reference to the State's brief will be indicated by the abbreviation "St. Br." followed by the number of the page on which the reference may be found. References to the Foundation's brief will be indicated by the abbreviation "Fnd. Br."

violation. We will then briefly address the State's disingenuous reformulation of the standards for judging abuse and its recasting of this Court's pronouncements on Rule 52(a). Finally, we will consider the Foundation's nihilistic call to discard the legal past and declare a new, free-form law of abuse.

I

THE STATE'S ATTEMPT TO SWEEP ASIDE FACTUAL FINDINGS, MADE BY THE DISTRICT COURT AFTER A FULL EVIDENTIARY HEARING, SHOULD BE REJECTED

The State launches three attacks against the District Court's factual findings on the *Massiah* violation. *First*, it works to portray the District Court as confused and capricious, reaching "two different conclusions" on the merits and (St.Br. 29), "simply chang[ing] its mind . . . unsupported by any evidence." (St.Br. 30-31). *Second*, it reargues the evidence, marshalling a long list of State witnesses who deny any knowledge of a *Massiah* violation. *Finally*, it lashes out at jailor Ulysses Worthy, throwing every brick available, heedless of the record on this appeal. Let us address these attacks in order.

A. The District Court's Purported "Change of Mind"

Petitioner fully agrees with the State on one point: the District Court was initially quite skeptical of petitioner's *Massiah* allegations. The record clearly demonstrates that, at the outset of the federal hearing on July 8, 1987 – prior to the receipt of any evidence – the court expressed (i) open doubts about the existence of a *Massiah* violation and (ii) confidence in the word of informant Offie Evans. (*See, e.g.* R4-4-5). Once the evidence began to come in, however, the District Court began to change its mind. The change was prompted by the facts – by the testimony of relevant witnesses, by documents, by transcripts of prior proceedings – all of which led to the findings the State now laments.

This is, of course, exactly the process of decisionmaking contemplated by the Anglo-American system. The State can have no real quarrel with the process, only with the outcome. The record shows, not a district court that was confused, but a district court that became enlightened. Indeed, there is no better indication of the strength of petitioner's evidence than its power to move the district judge from an initial presumption *against* petitioner's claims to an ultimate grant of habeas relief. (*See* R5 165-166).

B. The Evidence of a *Massiah* Violation

What was the evidence that caused the District Court to change its mind? The State has stressed its long list of witnesses, each of whom has denied knowledge of any *Massiah* violation: among them, District Attorney Russell Parker (St.Br. 9); jailor Carter Hamilton (St.Br. 9 & 11); and Detective Jowers (St.Br. 9). Yet most of these witnesses were outside the circle of conspiracy, and their denials thus mean nothing.[2] One cannot disprove

---

[2] Although the State stresses, for example, that jailor Hamilton knew of no move of informant Evans in the Fulton County Jail (St.Br. 11), during cross-examination, Hamilton admitted that his knowledge was confined to what happened on his work shift, on the first floor of the multi-floor, multi-wing jail (R6-76):

> Q. All right. And if a prisoner were placed initially in isolation on the second floor and after a day or two moved down on to the first floor, would you have known necessarily that he had been on the . . . second floor before he appeared within your area of responsibility on the first floor?
>
> A. You know, unless somebody told you, no . . .
>
> Q. All right. And, in fact, with respect to Offie Evans in particular, you don't have any present-day recollection as to the circumstances of his

(Continued on following page)

Caesar's assassination by calling witnesses who weren't at the Capitol.

There were other witnesses, however, whose testimony did present critical credibility choices for the District Court. Chief among them were Atlanta Detectives Sidney Dorsey and Welcome Harris. Both of these officers, during the 1987 federal hearing, denied that they had ever held any private jailhouse meetings with Offie Evans at which an illegal informant relationship could have been discussed. They claimed to have attended only the July 12, 1978, meeting where District Attorney Parker was present. (St.Br. 10 & 12).

Yet petitioner produced contrary evidence – drawn directly from informant Offie Evans himself. During petitioner's 1981 state habeas corpus hearing, Offie Evans told the state habeas court of *two* meetings with Atlanta detectives, the *first* with Detectives Welcome Harris and Sidney Dorsey alone (St. H. Tr. 117; Fed. Exh. 16), the *second*, with Parker and others. (St. H. Tr. 118).[3]

(Continued from previous page)

being brought into the Fulton County Jail; isn't that correct?

A. . . . No. As to when he came in, no, sir. I don't know that.

(R6-74-75). The District Court made exactly this point in its findings: "The lack of corroboration by other witnesses is not surprising; the other witnesses, like Assistant District Attorney Parker, had no reason to know. . . . " (J.A. 81).

[3] Detective Dorsey mentioned during the 1987 federal hearing that he had been contacted by Assistant District Attorney Parker following petitioner's 1981 state habeas corpus hearing. (R6-86-88). During their conversation, Parker and Detective Dorsey discussed the testimony given by Offie Evans at petitioner's hearing, specifically mentioning Evans' testimony which revealed a possible *Giglio* violation. Apparently, Detective Dorsey assured the prosecutor "that the man [Evans] was lying" (R6-87) and that he "didn't remember any type conversation of that type." (R6-87).

In addition to this sharp contradiction, Detective Sidney Dorsey's testimony caught the District Court's ear for a second reason. Dorsey was remarkably evasive, professed a selective memory loss, and appeared carefully rehearsed in his denials. Dorsey was forced to acknowledge, however, that he had known informant Evans prior to the McCleskey case, indeed, that he had personally used Evans as an informant in other cases. He nonetheless claimed to have lost all memory about his dealings with Evans during this investigation:

Q. Okay . . . [Evans] found himself in the Fulton County Jail in July of 1978. Did you go see him at any point in July?

A. Counselor, I do not recall going to see Offie Evans at the Fulton County Jail during that time or any time.

Q. Do you remember any meetings that might have been held between Mr. Evans and yourself and Detective Harris and Russell Parker at the jail?

A. Counselor, in all honesty, I do not.

* * *

A. I'm not suggesting that the meeting didn't take place, nor am I suggesting that I wasn't there. *I just don't recall being there and for some reason no one else remembers my being there either.*

(R5-57-58, 59-60) (emphasis added).

As the excerpt above reveals, Detective Dorsey did not deny categorically that he had met with Evans. On the contrary, he acknowledged that he "probably did" meet with Evans (R5-60), that it was "very possible" he had done so. (R5-66). He simply could not remember.

To summarize: a police-officer was murdered; Detective Dorsey was on the team assigned to the case; no solid evidence emerged to identify the triggerman; Dorsey learned, however, that Warren McCleskey, a chief suspect, and Dorsey's old friend and informant, Offie Evans, were both being housed in the Fulton County Jail; informant

Evans soon thereafter came forward with crucial evidence, collected at the jail from McCleskey; and Dorsey took part in the meeting where District Attorney Parker first heard the crucial evidence. Yet Dorsey – the only officer who had known Evans previously – testified that he remembered nothing about the events that led to this dramatic break in the case.

It was after listening to this evidence that Judge Owen Forrester reached his conclusion: "Unforfunately, one or more of those investigating Officer Schlatt's murder stepped out of line. Determined to avenge his death the investigator(s) violated clearly-established case law." (J.A. 90). "Detective Dorsey," the District Court observed elsewhere, "had an obvious interest in concealing any [*Massiah*] arrangement." (J.A. 82).

Under Rule 52, these findings were reasonable, they were not "clearly erroneous," and they are not subject to reargument here by the State.

C. The Testimony of Ulysses Worthy

The State's most vehement remarks are reserved for jailor Ulysses Worthy, whose testimony, it contends, "is so inconsistent, confusing and incoherent that one cannot discern readily any specific facts." (St.Br. 12). During Worthy's initial federal appearance on July 9, 1987, however, the basic outlines of his story seemed clear enough to the State's attorney:

> Q. [By the State]: Mr. Worthy, let me see if I understand this. Are you saying that someone asked you to specifically place Offie Evans in a specific location in the Fulton County Jail so he could overhear conversations with Warren McCleskey?
>
> A. Yes, ma'am.

(R5-153). The "someone" Worthy was referring to, he clarified, was Detective Sidney Dorsey or some other "officer on the case." Jailor Worthy remembered that Dorsey and another officer had met privately with Offie

Evans in Worthy's own office at the Fulton County Jail. (R5-147-149; 150-153). Mr. Worthy offered one additional clarification:

> Judge, may I clarify that? . . . in this particular case this particular person [Evans] was already incarcerated. They just asked that he be moved near where the other gentleman [McCleskey] was.

(R5-155).

Worthy's testimony thus corroborated Offie Evans' state habeas testimony on two points – that a private meeting had occurred at the Fulton County Jail, and that both Detective Dorsey and informant Evans had attended it. Moreover, the previously undisclosed fact that Offie Evans had been moved from elsewhere in the Fulton County Jail to the cell next to petitioner McCleskey cleared up a central puzzle about Evans' 21-page statement.[4]

The State focuses its attack not on the straightforward account Worthy gave on July 9th, but on his second appearance – as a State's witness – during a rebuttal hearing held the following month. Worthy came before the District Court on July 9th without any time for

---

[4] Although Evans was arrested and taken to the Fulton County Jail on July 3, 1978 (R5-101-17), his written statement is absolutely silent concerning any contact with McCleskey during the four-day period between July 3rd and July 8th. Only beginning on the 8th of July did Evans' statement begin to report any conversations with McCleskey and his partner Bernard Depree. (Pet. 8, at 1). Not until July 9th did Evans report that he first introduced himself to McCleskey, claiming that he was Ben Wright's uncle "Charles." (Pet. 8, at 3).

Why did Evans – whose statement reveals him to be a voluble and aggressive questioner – sit silently next to McCleskey for nearly a week? Worthy's testimony provided the answer: Evans had not been present in an adjacent cell until after his move, which came only several days after he was initially incarcerated. His non-stop questioning began soon after the move had been made.

rehearsal or any reason to shade his recollections; he had spoken with counsel for the State and for petitioner only momentarily before he took the stand. (R6-50-52; R6-118-119). Worthy later acknowledged that on July 9th, he knew nothing about the legal issues or the testimony of previous witnesses. (R6-52-53).

In the month between his initial hearing and the rebuttal hearing, however, Worthy – an eighteen-year veteran of the Sheriff's Department (R6-13) – met at least twice with State's attorneys. (R6-53-54). He also studied a newspaper account of the first hearing. (R6-55-56). When he reappeared under State auspices at the rebuttal hearing, Worthy initially tried, on direct examination, to retract important portions of his original account in a manner favorable to the State. When cross-examination began, however, he reluctantly reconfirmed, one-by-one, the major features of his earlier testimony. (*See* R-6-25-50). The District Court itself took over the questioning on the crucial issues:

> THE COURT: But you're satisfied that those three things happened, that they asked to have him put next to McCleskey, that they asked him to overhear McCleskey, and that they asked him to question McCleskey.
>
> THE WITNESS: I was asked can – to be placed near McCleskey's cell, I was asked.
>
> THE COURT: And you're satisfied that Evans was asked to overhear McCleskey talk about this case?
>
> THE WITNESS: Yes, sir.
>
> THE COURT: And that he was asked to kind of try to draw him out a little bit about it?
>
> THE WITNESS: Get some information from him.

(R6-64-65; *accord*, R6-26-28).

Although the State argued to the District Court – and now to this Court – that Worthy was "confused," petitioner urged another view: that the District Court should credit Worthy's uncoached account of July 9th, and

should view Worthy's hedging during the rebuttal hearing as the reluctance of a long-time law enforcement official, now well informed about the State's case, to give testimony damning the conduct of fellow police officers. In its subsequent opinion, the District Court demonstrated that it had thoroughly weighed these alternative interpretations (J.A. 80-81) and "[a]fter carefully considering the substance of Worthy's testimony, his demeanor, and the other relevant evidence," resolved the facts in petitioner's favor.

This is precisely the sort of factual finding that Rule 52 commits to district courts. *Anderson v. City of Bessemer City*, 470 U.S. 574, 757 (1985); *Amadeo v. Zant*, 486 U.S. 214 (1988); 486 U.S. 214, 225-226 (1988). The State's present attempt is nothing more than a reargument of factual points which have found acceptance neither in the District Court nor in the Court of Appeals. These arguments should be rejected.[5]

II

AMADEO V. ZANT CONTROLS THE ABUSE ISSUE ON PETITIONER'S APPEAL. NONE OF THE DISTRICT COURT'S FACTUAL FINDINGS ON ABUSE WERE "CLEARLY ERRONEOUS"

The District Court also made careful factual findings on the issue of abuse of the writ. The State avoids their

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[5] Needless to underscore, the State's resort to a subsequent adjudication of similar factual issues in another defendant's case – not a part of this record – is legally irrelevant and improper. *Ciucci v. Illinois*, 356 U.S. 571, 573 (1958) (per curiam) ("material, not being part of the record, and not having been considered by the [lower] courts, may not be considered here"); *cf. United States v. Johnson*, 713 F.2d 633, 648 (11th Cir. 1983); *see generally*, Rule 10(e), Fed. R. App. P.

The State had three prior opportunities to counter petitioner's evidence in this case – (i) during the original federal hearing in July of 1987, (ii) during the rebuttal hearing in August of 1987, and (iii) during its Rule 60(b) proceedings in 1988. It succeeded on none of them. Given three strikes, the State's factual argument is surely out.

force by characterizing them as "mixed questions of fact and law" which should receive *de novo* review (St.Br. 27) and, alternatively, by urging that they are clearly erroneous. (St.Br. 17). Neither course is acceptable.

Let us examine the questions the State would designate "mixed questions of fact and law." The District Court found for example (i) that there was "no showing of any reason that petitioner or his counsel should have known to interview Worthy specifically with regard to the *Massiah* claim" (J.A. 85), and (ii) that conducting interviews with three Atlanta police officers and jailors who later testified at the federal hearing "would [not] have allowed petitioner to assert this claim any earlier." (J.A. 85). The Court of Appeals disagreed with these findings; it asserted that petitioner had not "shown that a more extensive effort at that time . . . would not have turned up Worthy," (J.A. 128), and faulted counsel for not interviewing the officers.

As *Amadeo v. Zant* teaches, however, the District Court's findings on these points constituted primary, historical facts; the Court of Appeals was not free to disregard them. The progression of this case from district court to court of appeals parallels that in *Amadeo v. Zant*. Long after his trial, Amadeo uncovered an incriminating memorandum which indicated that the State had deliberately skewed jury lists to underrepresent blacks and women on his jury. 486 U.S. at 217-218. The State countered that Amadeo's lawyers should have found the memo earlier, and that Amadeo should therefore be barred from asserting the claim in habeas proceedings, absent proof of "cause" and "prejudice" under *Wainwright v. Sykes*.

The district court in *Amadeo* held an evidentiary hearing on the competing contentions; the principal questions, this Court later noted, were whether or not the State's jury misconduct

> was . . . reasonably discoverable because it was concealed by [State] officials, and if that concealment, rather than tactical considerations,

> was the reason for the failure of petitioner's lawyers to raise the jury challenge in the trial court.

486 U.S. at 222. Afterwards, the *Amadeo* court found as fact: (i) that the incriminating memorandum "was not reasonably available to petitioner's lawyers," 486 U.S. at 223; and (ii) that "petitioner's [trial] lawyers did not deliberately bypass the jury challenge." 486 U.S. at 224. When the Court of Appeals "expressed disagreement and substituted its own factual findings," (*id.*), this Court unanimously reversed, citing Rule 52 and the consistent line of cases enforcing that Rule. *E.g., Anderson v. City of Bessemer City*, 470 U.S. 564 (1985).

There is no meaningful distinction between the finding in *Amadeo* that the State's jury memo was not "readily discoverable" by Amadeo's counsel, and the finding here that Evans' 21-page statement and Ulysses Worthy would not have been discovered through further defense investigation. (J.A. 84). Nor is there a distinction between the district court findings in both *Amadeo* and *McCleskey* that "petitioner's lawyers did not deliberately bypass" their respective claims.[6] The designation of these issues as questions of fact for the district courts is thus directly controlled by *Amadeo*; it is also consistent with the Court's treatment of other, similar issues. *Cf. Maggio v. Fulford*, 462 U.S. 111 (1983) (per curiam) (petitioner's competence to stand trial requires deference under 28 U.S.C. §2254(d)).

The State alternatively argues that the court's finding that Evans' 21-page statement was not readily available

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[6] The most striking distinction between the two cases is that petitioner McCleskey's counsel was far more active in seeking the written documents and other evidence that ultimately made its claim. The trial lawyers in *Amadeo* apparently looked only cursorily, if at all, for evidence of jury underrepresentation. The District Court nonetheless held that, since the evidence of State misconduct would not have been found in any event, they had shown "cause" for any procedural default.

should be overturned as "clearly erroneous," since "the record establishes counsel should have been aware of it and . . . the state did not 'conceal' its existence." (St.Br. 6). This argument rests on the dubious proposition that defense counsel should somehow have realized from the way in which the State said "No," that the State actually meant "Yes" – that it had more evidence all the time. This cannot be the law; due process demands more of the State than a clever round of Twenty Questions. Defense counsel sought all written statements – not once, not twice, but *four times*, orally and in writing. Never did State officials turn over Evans' statement. It is doubletalk for the State to claim that it made Evans' statement "available" even as it repeatedly declined to turn over the document.

After a search for other "inexcusable" failures of petitioner, the State musters nothing but a slender roster of omissions, chiefly counsel's failure to interview Detectives Harris, Dorsey and jailor Hamilton. (St.Br. 33). Yet Hamilton later acknowledged that he didn't know where Evans had been housed before he was moved next to petitioner McCleskey; Detective Harris denied knowing or ever meeting with Evans except at the joint meeting with District Attorney Parker; and Detective Dorsey professed not to remember anything at all. It is no wonder, then, that the District Court – which listened to every one of these witnesses – later found that "it is difficult to see how conducting such interviews would have allowed petitioner to assert this claim any earlier." (J.A. 85).[7]

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[7] The allegation that attorney Stroup "did not attempt . . . to talk to the pertinent people" (St.Br. 33) is baseless. We refer the Court to pages 8-12 of our opening brief for a description of Stroup's efforts to locate "pertinent people." Equally unfounded is the suggestion that petitioner could have "discovered [Ulysses Worthy] . . . by a simple question directed to Detective Harris." (St.Br. 35). The question that ultimately led to Ulysses Worthy sought to determine from Detective Harris

(Continued on following page)

Nothing the State can point to, in sum, demonstrates that the District Court's findings on the issue of abuse are "clearly erroneous."[8]

III

FOR "DELIBERATE BYPASS" PURPOSES, WHAT COUNTS IS NOT SOLELY COUNSEL'S AWARENESS OF THE *LEGAL* BASIS FOR A CLAIM, BUT COUNSEL'S AWARENESS OF FACTS THAT WOULD SUPPORT THE CLAIM

As an alternative to its factual reargument, the State also offers a new reading of *Sanders v. United States*: knowledge of the legal basis for a claim should be deemed legally equivalent to knowledge of facts that would support the claim.

(Continued from previous page)

where the 21-page statement by Offie Evans had been taken. (R4-195). Not until petitioner finally received a copy of that statement in 1987, only weeks before he filed his second habeas petition, did there exist a predicate for this "simple question."

[8] While it is not worthy of separate coverage, we note that the state dismisses the District Court's factual findings which undergird its harmless error analysis on the ground that "the district court was doing nothing more than examining the state trial transcript." (St.Br. 17) "[T]here was no reason why the Eleventh Circuit Court of Appeals could not rely on . . . what it observed from the trial transcript . . . Any reviewing court can make similar citations to the existing record." (St.Br. 38).

This argument betrays unfamiliarity with the Rule 52 cases decided by this Court. While appellate courts doubtless "can" carry out their own fact-finding with the benefit of an existing record, the Court has held that it is reversible error for them to do so. *See, e.g., Anderson v. City of Bessemer City*, 470 U.S. 564, 574 (1985). Yet here, that is exactly what happened. The Court of Appeals disregarded the District Court's primary findings of fact on the harmless error issue, adopted its own factual findings, and then declared that the *Massiah* error was harmless.

> "[T]here is no doubt that the Petitioner was aware of the [Massiah] claim as he raised it in his first state habeas corpus proceeding and counsel made a specific decision not to present the claim in the first federal petition . . . [T]his is precisely the type of conduct that the abuse of the writ doctrine is designed to prevent."

(St.Br. 23). Lest there be any doubt, the State repeats the point: "[T]he focus necessarily must be on the Petitioner's conduct, not his subjective believe as to the merits of the claim." (St.Br. 24).

Note carefully what the State proposes. This is not the conventional distinction between a "subjective" standard and an objective standard. An ordinary objective standard would charge a petitioner with knowledge of those facts and legal principles that a reasonable counsel should have uncovered. The State cannot acquiesce in such a standard here, of course, since the District Court expressly found that the facts demonstrating a *Massiah* claim are *not* reasonably discoverable by petitioner's counsel. Instead, the State turns to a new formulation; if a legal theory is known to counsel, he or she should be charged with carrying a claim forward *irrespective of whether any evidence can be found to support it*. Unsuccessful actions to substantiate the claim will not excuse an applicant; counsel must stubbornly cling to all conceivable claims, at every stage of post-conviction proceedings, irrespective of what the evidence shows, or risk the irremediable loss of those claims if some new evidence later comes to light.

Make no mistake; this is a strict liability standard; it has no warrant in this Court's precedents. It is foreign to the rationale of *Salinger v. Loisel*, 265 U.S. 224 (1924), *Wong Doo v. United States*, 265 U.S. 239 (1924), and *Price v. Johnston*, 334 U.S. 266 (1948). In those cases, the Court expressed keen interest in whether the applicants who

withheld their claims had access to the relevant facts.[9] Not only would the State's reformulation of *Sanders* depart sharply from precedent; we suggest to the Court that it would add measurably to the burden of present habeas corpus proceedings, by providing a major incentive for prudent habeas counsel to file – and pursue through discovery – enormous, outsized, factually dubious habeas pleadings. We doubt that either the interests of justice, or the interests of judicial administration, would be served by this result.

IV

THE CALL TO FASHION A NEW JUDICIAL STANDARD FOR JUDGING SUCCESSIVE HABEAS CLAIMS SHOULD BE REJECTED

Both the State and the Foundation – though primarily the latter – urge the Court to use Warren McCleskey's case as a vehicle to announce a new standard for successive petition cases. The State justifies its call with the assertion that "habeas corpus and the particular concept of abuse of the writ have been fluid concepts." (St.Br. 20).

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[9] For example, Price's attorney surely must have known that a prosecutor could not lawfully suborn perjury. Counsel also knew that after Price's prosecutor had conferenced with a key witness during a mid-trial break, the witness changed his testimony materially. The Court nevertheless allowed Price to proceed with a fourth federal habeas petition, alleging prosecutorial misconduct, because the Court could not assume, without further hearings, "that petitioner has acquired *no new or additional information* . . . that might indicate fraudulent conduct," 334 U.S. at 290 (emphasis added). The Court added that *"even if it is found that petitioner did have prior knowledge of all the facts*, . . . [he] may be able to present adequate reasons for not making the allegations earlier . . . which [would] make if fair and just for the trial court to overlook the delay." (*Id.*) (emphasis added). The rule in *Price* is a far cry from what the State has in mind.

The Foundation is more careful about its historical generalizations and more reckless in its future prescriptions. The Foundation has conducted sufficient historical review to recognize the longstanding legal commitment to preserve the resort to successor petitions – a commitment better described as "solid" than as "fluid."

Realizing that precedent is against its position, the Foundation has chosen to urge that the past be cast aside – lock, stock and barrel. Its method is veiled, but the underlying aim is clear. The Foundation dismisses the uniform teaching of the common law by stressing that "[t]he common law writ was totally unavailable for the relief which petitioner seeks in this case." (Fnd.Br. 3). Yet the major expansion of *substantive rights* of criminal defendants during the past two centuries does nothing to diminish the petitioner's *procedural* point: that an unbroken legal tradition has honored successive habeas petitions, allowing good faith applicants to raise, through habeas procedures, whatever legal rights the society has determined should be available to them.

The Foundation's review of federal precedent suffers from the same flaws, finding distinctions and distractions to obscure the central point. For example, it recasts *Ex parte Cuddy*, 40 F. 62 (1889), an early case that strongly supports petitioner's position (see Petitioner's Opening Brief at pages 29-30, note 26), to hold that "the denial of a prior writ is generally a sufficient reason to deny a second or subsequent writ, absent facts which did not *exist* at the time of the first petition." (Fnd.Br. 26). That is simply not what *Cuddy* held; it's not even a fair inference.

The crucial facts that Cuddy proffered in his second habeas petition were well-known to him at the time of his first application. As Justice Field stressed in denying the second application, not only did Cuddy fail to introduce those well-known facts at his initial hearing, he made no attempt to add them to the record by way of a supplemental application, or alternatively to suggest during his appeal that there were extra-record facts that might bolster his position. 40 F. at 66.

Read correctly, *Cuddy* presages later cases like *Wong Doo v. United States*, 265 U.S. 239, 241 (1924), where this Court branded a second application as an abuse because the record showed that the applicant "had full opportunity" to offer facts that were "accessible all the time" during his initial application. Petitioner's case plainly draws support from these cases, for it is undisputed that he did not have access to the crucial facts when he brought his initial federal petition; indeed, State officials were actively hiding the facts from him.

The Foundation's dismissive air extends not only to prior judicial precedent but to its analysis of the strong evidence that Congress opposes judicial encroachments on the law governing successive petitions. Perhaps its legislative analysis is best excused by its apparent conviction that any resort to legislative history is "dangerous" if not improper. (Fnd.Br. 22). Whatever, the explanation, the Foundation's analysis is faulty and misleading. For example, after arguing forcefully that the enactment of 28 U.S.C. §2244(b) in 1966 was meant to "make a substantial change in the law," (Fnd.Br. 22), the Foundation's factual support for its contention proves an anticlimax, little more than an expression of regret that "the [legislative] reports shed very little light on the precise contours of the intended change." (Fnd.Br. 23). The legislative reports in fact expressly identify the behavior that Congress was taking aim to proscribe – claims in successive petitions "predicated on grounds obviously well known to them when they filed the preceding application." S. Rep. No. 1797, 89th Cong., 2d Sess. 2 (1966). Yet since this target wouldn't fit the Foundation's purpose, the reference is dismissed as merely one example on a longer (but unspecified) congressional list.

The Foundation's exegesis of the legislative history of Rule 9(b) is similarly incomplete. It proceeds by sketching various polar positions urged on Congress by different groups, and then argues that since none of these positions

was finally accepted, Congressional intent must lie somewhere in the middle. (Fnd.Br. 23-25). Relegated to a passing reference is the language of the House Judiciary Committee's own final report, which stressed that the Committee sought to avoid "a new and undefined standard that [would give] a judge too broad a discretion to dismiss a second or successive petition." H.R. Rep. No. 94-1471, 94th Cong., 2d Sess. (1976). (The report also expressed congressional desire to "bring rule 9(b) into conformity with existing law," citing *Sanders* and 28 U.S.C. § 2244(b).)

V

PETITIONER McCLESKEY IS ENTITLED TO RELIEF ON THE MERITS EVEN UNDER A "CAUSE" AND "PREJUDICE" STANDARD

Having cut its great road through the law, the Foundation urges the Court to adopt a new "cause" and "prejudice" test for abuse, drawn from *Wainwright v. Sykes* and its progeny. The wisdom of this proposal aside, its timing is wrong. The Court should not announce a major change in the law that would have no effect upon the outcome of the case before it. Yet Warren McCleskey's *Massiah* claim would meet a "cause" and "prejudice" test. The Foundation itself appears uneasy on this point, conceding that, in principle, proof that the State concealed evidence would establish "cause" under *Amadeo v. Zant*. (Fnd.Br. 28). Yet with no more than passing knowledge of petitioner's record, the Foundation boldly asserts that "[p]etitioners showing falls far short of the kind of cover-up which constituted cause for default in *Amadeo*." (Fnd.Br. 29).

The Foundation plainly does not know this record well enough to make a credible argument.[10] Even were it

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[10] The Foundation has attempted a lesson in lawyering-by-hindsight to make its point: "Where the testimony of a jailhouse informant is central to the case, a claim under *United*

(Continued on following page)

better informed, however, it would still face an insuperable barrier in Rule 52. The District Court here made extensive factual findings on the underlying State misconduct, the availability of the hidden evidence, and the steps taken by habeas counsel to obtain that evidence. *Amadeo* holds unmistakably that these factual findings are not open to later revision or dismissal, neither by disgruntled parties nor by the appellate courts, nor by *amici*. Absent proof that the findings are "clearly erroneous," they must be honored on appeal. Thus, even under the Foundation's proposed test, petitioner McCleskey would be entitled to full habeas corpus relief.

CONCLUSION

This reply brief has addressed several points in the State's presentation. Left till last is one central point:

(Continued from previous page)

States v. Henry . . . is the obvious first place to look. The officer in charge of cell assignments would be the first person to ask. That person, apparently, was Officer Worthy, the officer now claimed to be a newly discovered witness." (Fnd.Br. 27).

Petitioner doesn't disagree with the fundamentals of this lesson. Its application to this case, however, overlooks (i) that petitioner's habeas counsel here *did* immediately see the possibility of a *Henry/Massiah* claim; (ii) that they asserted such a claim, then investigated that claim; (iii) that they also asserted a related claim, under *Giglio v. United States*, 405 U.S. 150 (1972), and eventually uncovered evidence sufficient to obtain relief from the federal district court (although relief was later overturned on appeal); (iv) that they too, thought of locating the officer in charge of cell assignments; and (v) that *they did so*, even though that officer – Bobby Edwards, *not* Ulysses Worthy, as the Foundation incorrectly assumed – had retired from the Fulton County Jail and was located, only with difficulty, in a community over 90 miles from Atlanta. (See Petitioner's Opening Brief at pages 9-10; R4-47-49). In short, measured by the Foundation's standards, petitioner's performance, as the District Court found, was reasonable and adequate.

Certain State officials have been caught hiding the very evidence that other State officials now contend should have been uncovered by petitioner sooner. Petitioner's claim should be barred, the State says, even though State actors "stepped out of line . . . [and] ignored the rule of law." (J.A. 90).

Petitioner's case is strong on all issues; but on this point, as *Amadeo* teaches, his legal position is unassailable. The State cannot "sandbag," withholding crucial evidence when asked for it, and then profit by its own misconduct. Nor can it be allowed to defend its misconduct with the excuse that the left hand didn't know the mischief the right hand was up to. When a State prosecutor testifies, under oath, that his prosecution of a capital case was not tainted by unlawful informant testimony, lawyers and citizens alike are entitled to rely on his word. It is not an abuse of the Great Writ for habeas applicants and their counsel to repose confidence in the integrity of State authorities.

The judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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Supreme Court, U.S.
FILED
JUL 30 1990
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1989

WARREN MCCLESKEY,
Petitioner,

vs.

WALTER ZANT, Warden,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF OF THE ALABAMA CAPITAL REPRESENTATION RESOURCE CENTER, VOLUNTEER LAWYERS' RESOURCE CENTER OF FLORIDA, INC., AND GEORGIA APPELLATE PRACTICE AND EDUCATIONAL RESOURCE CENTER, INC. IN SUPPORT OF PETITIONER

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INTEREST OF AMICI CURIAE

Amici Curiae -- Alabama Capital Representation Resource Center, Volunteer Lawyers' Resource Center of Florida, Inc., and Georgia Appellate Practice and Educational Resource Center, Inc. (hereinafter "Resource Centers") -- aid in the post-conviction representation of death-sentenced inmates in states most directly affected by the Eleventh Circuit Court of Appeals' decision in McCleskey v. Zant, 890 F.2d 342 (11th Cir. 1989). The Resource Centers, established in part through the efforts of the federal judiciary and funded in part by the Judicial Council and the Criminal Justice Act, were created to help ensure that all death-sentenced inmates in Alabama, Florida, and Georgia are adequately represented in their post-conviction appeals.[1]

Amici strongly concur with, and cannot improve upon, the contentions in the Brief for

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1. Amici file this brief in support of Petitioner by written consent of all parties pursuant to Rule 37.3 of the Rules of this Court. The parties' letters of consent are on file with the Clerk of the Court.

Petitioner (1) that the lower court penned onerous new law and failed properly to apply long-standing precedent regarding deliberate abandonment and inexcusable neglect in resolving whether Petitioner had abused the writ of habeas corpus, and (2) that the lower court wrongly "substituted its own factual findings for those of the District Court" and wrongly "rejected the District Court's conclusion that petitioner's lawyers did not deliberately bypass," Amadeo v. Zant, 486 U.S. 214, 224 (1988), presentation of Petitioner's compelling claim under Massiah v. United States, 377 U.S. 201 (1964). While some is said in the Brief of Petitioner about the lower court's unwriting of precedent, the brief mainly focuses upon the fact of the unwriting rather than upon the resulting impact. For example, as put by Petitioner, "[w]hatever may be said for the wisdom of [the lower court's] rule, it is indisputably not

the present law." Brief of Petitioner at ___.[2]

Amici are uniquely situated to address "the wisdom" of the lower court's new rule. The opinion in McCleskey v. Zant, 890 F.2d 342 (11th Cir. 1989), will severely impair the ability of the Resource Centers to accomplish the mission for which they were established: (1) to recruit additional, highly qualified volunteer counsel to represent capital inmates in state and federal collateral review proceedings; and (2) to provide resources to volunteer counsel -- such as assistance in investigating cases, identifying issues, researching petitions and briefs, and preparing for hearings -- to enable them to represent their clients zealously and effectively. These are highly relevant consequences that have not already been

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2. At the time amici prepared this Brief, the Brief of Petitioner was not in final form. Because proper page citation to that brief is not possible, all references by amici to written arguments made and facts discussed by Petitioner will hereinafter cite Mr. McCleskey's Petition for Writ of Certiorari.

brought to the Court's attention by the parties, and, it is respectfully suggested, an explication of these consequences would be of considerable help to the Court. Rule 37.1.

Recruitment of volunteer counsel will be impeded by McCleskey's requirement that volunteer counsel perform under a strict liability standard. The ruling in McCleskey requires volunteer counsel to: (1) identify every potential claim in a case, whether or not there is any available factual support whatsoever for the claim; (2) investigate each claim exhaustively, even if there have been numerous representations and indications that the claim is factually unsupportable; (3) continue to assert identified claims for which counsel has been unable to garner factual support, because of the possibility that in the future, facts substantiating the claims -- which may even have been purposefully concealed by the State -- will be divulged; and (4) carry out these responsibilities whether or not counsel has the resources to do so or can obtain such resources from the

courts. These conditions will make attorneys who might otherwise volunteer to represent a death-sentenced inmate extremely reluctant -- and outright frightened -- to do so.[3]

In addition, under the current staffing and funding levels of the Resource Centers, the McCleskey standard will force Resource Centers to devote more time and resources to fewer cases in order to approach the goal of effective representation, since no case can be handled properly under McCleskey without an exponential increase in the amount of time and resources devoted to the case. Finally, the Resource Centers' goal of zealously and effectively protecting the constitutional rights of death-sentenced inmates will be seriously undermined by the lesson of the McCleskey decision: that states have

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3. Ethical standards such as Fed.R.Civ.P. 11 may require that claims be abandoned due to a lack of discovered factual support. Nevertheless, McCleskey requires that volunteer counsel -- in contravention of Rule 11 and without any guarantee that they will not be sanctioned under that Rule -- continue to assert baseless claims. See footnote 11, infra.

absolutely no incentive voluntarily to comply with constitutional mandates and, instead, will be rewarded for illegally concealing constitutional violations -- if the violation is hidden long enough, the death-sentenced inmate will not be heard to complain that he or she was denied basic safeguards guaranteed by our Constitution. These consequences should be considered by this Court, and the Resource Centers' distinctive role in the capital post-conviction process in the Eleventh Circuit enables them to provide considerable help to the Court in support of Petitioner.

SUMMARY OF ARGUMENT

The decision in McCleskey v. Zant, 890 F.2d 342 (11th Cir. 1989), will have far-reaching implications for the litigation of federal habeas corpus petitions by condemned prisoners. McCleskey imposes a strict liability standard on the performance of habeas counsel. The McCleskey court found that Petitioner abused the writ by not asserting his claim under Massiah v. United States, 377 U.S. 201 (1964) in his first federal habeas petition, although the court did not find that it was unreasonable or inexcusably neglectful for Petitioner not to have been aware of the factual substantiation for that claim -- which had been persistently concealed by the State -- at the time he filed his first federal habeas petition.

A strict liability standard is unprecedented as a means of determining the consequences of a criminal defendant's failure to discover factual bases for a claim. It is likewise at odds with settled abuse of the

writ principles and with the equitable underpinnings of the abuse of the writ doctrine. Moreover, the strict liability performance standard imposes an impossible burden on habeas counsel exhaustively to investigate every potential claim and to continue to assert claims even in the absence of available factual support.

McCleskey also creates a disincentive for states voluntarily to comply with constitutional mandates. The State concealed its violation of Petitioner's Sixth Amendment rights for nine years, despite diligent and repeated requests by Petitioner's trial and habeas counsel for any information which might reveal the violation. For its chicanery, the State went not merely unpunished, but was rewarded with a finding that Petitioner -- the innocent dupe in the State's ongoing scheme -- had abused the writ of habeas corpus by asserting the claim in a second federal habeas petition immediately after he serendipitously discovered the factual evidence that had long been concealed by the State. This Court has

refused to reward states' misconduct by procedurally barring petitioners' claims in the procedural default context, and it should likewise decline to condone state wrongdoing in the abuse of the writ setting.

ARGUMENT

I. THE DECISION IN McCLESKEY V. ZANT, 890 F.2d 342 (11TH CIR. 1989), IMPOSES A STRICT LIABILITY STANDARD OF PERFORMANCE ON FEDERAL HABEAS COUNSEL WHICH IS NOT ONLY UNPRECEDENTED, BUT ALSO IMPOSSIBLE TO MEET WITHOUT AN INFUSION OF ADDITIONAL RESOURCES FAR IN EXCESS OF THOSE NOW AVAILABLE TO ATTORNEYS REPRESENTING HABEAS PETITIONERS

As Mr. McCleskey's Petition for Writ of Certiorari points out, the lower court's opinion in McCleskey v. Zant, 890 F.2d 342 (11th Cir. 1989), transmogrifies the "abuse of the writ" doctrine to hold federal habeas petitioners, and their attorneys, strictly liable for any failure to discover factual support for a claim during a first federal habeas petition, regardless of the reason for that failure. See Petition for Writ of Certiorari at 28-31. The Eleventh Circuit Court of Appeals found that Petitioner abused the writ of habeas corpus by not including his claim under Massiah v. United States, 377 U.S. 201 (1964), in his first federal habeas petition, even though at the time the first petition was filed, Petitioner and his

attorneys did not know, and had no reason to know, that there was factual support for the claim.[4]

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4. After the conclusion of Petitioner's first federal habeas corpus proceedings, habeas counsel fortuitously discovered evidence clearly establishing a Massiah violation. See Petition for Writ of Certiorari at 13 & n.8. The facts proving the violation -- although concealed by the State for nine years -- were never seriously disputed after they were revealed. Petitioner and three co-defendants were arrested for a robbery during which a police officer was killed. In an effort to discover which of the four participants killed the officer, the victim's fellow officers launched a scheme to procure an illegal confession from Petitioner. Several detectives met with a known jailhouse informer, Offie Evans, and a jailer, Ulysses Worthy, at the Fulton County Jail where Petitioner was confined. During that meeting, the detectives asked Mr. Worthy to move informer Evans from another part of the jail into a cell adjacent to Petitioner's cell. The detectives then arranged for Evans to elicit a "confession" from Petitioner, by coaching Evans about how to approach Petitioner and giving Evans critical facts about the crime unknown to the general public. See Petition for Writ of Certiorari at 3-6; McCleskey v. Zant, Civil Action No. C87-1517A (N.D.Ga. Dec. 13, 1987) at 23-30.

Pursuant to the conspiracy, Evans was transferred to a cell next to Petitioner's and engaged Petitioner in conversation. Eventually, Evans reported all that he had purportedly learned from Petitioner, including an alleged confession to the shooting, to an Assistant District Attorney.

(continued...)

The McCleskey court did not examine whether counsel's ignorance of the facts supporting Petitioner's Massiah claim at the time of the first federal habeas proceedings resulted from an unreasonably sub-standard attorney performance in investigating the claim.[5] Rather than analyzing whether

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4. (...continued)
Evans also recorded his tactics and the results in a stunning 21 page statement to police officials. The information obtained by Evans from Petitioner was the key evidence used against Petitioner at his trial, and the basis for Petitioner's conviction for malice murder and sentence of death. See Petition for Writ of Certiorari at 15-19; McCleskey v. Zant, Civil Action No. C87-1517A (N.D.Ga. Dec. 13, 1987) at 29-31. Evans' relationship with the police and the existence of his 21 page written statement were concealed by the State for nine years after Petitioner's trial, despite repeated attempts by Petitioner's trial and habeas counsel to obtain such information. See Petition for Writ of Certiorari at 8-14, 29-30 n.16.

5. The District Court specifically found that reasonably competent counsel could not have discovered the evidence supporting Petitioner's Massiah claim at the time the first federal habeas petition was filed. See Order in McCleskey v. Zant, Civil Action No. C87-1517A (N.D.Ga. Dec. 13, 1987) at 25; Petition for Writ of Certiorari at 30. Mr. McCleskey's Petition for Writ of Certiorari details the arduous efforts of counsel to obtain factual support for the claim prior to filing the first federal habeas petition, see
(continued...)

counsel's failure to discover the key evidence of a Massiah violation was the product of inexcusable neglect, a lack of due diligence, or a failure to undertake reasonable investigation, the Eleventh Circuit Court of Appeals determined that assertion of the Massiah claim in a second federal habeas petition was abuse of the writ simply because counsel purportedly could have discovered the evidence earlier. McCleskey v. Zant, 890 F.2d at 348-50. The fact that evidence in support of the Massiah claim ultimately surfaced during the second federal habeas proceeding convinced the court that the evidence was discoverable at an earlier time.[6] Without

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5. (...continued)
e.g., p. 8-14, 29-30 n.16, all of which were impeded by -- viewed in the most generous light -- "misrepresentations" by a variety of state actors, which resulted in the concealment of evidence crucial to the Massiah claim for nine years.

6. Even under the court's improper "could have discovered" standard -- which wholly ignores the reasonableness and diligence of counsel's earlier search for factual substantiation of a Massiah violation -- it is not at all clear that Petitioner abused the writ. Because the State
(continued...)

finding counsel's initial investigation of the claim unreasonable or incompetent, the court concluded that Petitioner had abused the writ because counsel's early investigative efforts were "somewhat lacking" and counsel could have engaged in a "more extensive effort at th[e time of the initial petition] to track down persons with information." McCleskey, 890 F.2d at 349-350 (emphasis added).[7]

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6. (...continued)
persistently concealed the evidence, see e.g., Petition for Writ of Certiorari at 8-14, counsel's investigatory efforts, no matter how thorough, may not have uncovered the crucial information before the first federal habeas petition was filed. Counsel was only able to discover the critical piece of evidence after a change in the Georgia Open Records law which occurred after the first federal habeas proceeding. See Petition for Writ of Certiorari at 13 & n.8. That one piece of evidence ultimately led, through a long and tortuous path, to the discovery of the clear Massiah violation in Petitioner's case. Id. at 13-14.

7. An analytical framework for assessing the reasonableness of counsel's decision not to undertake additional investigation was developed by the Eleventh Circuit Court of Appeals in Foster v. Dugger, 823 F.2d 402, 405 (11th Cir. 1987), cert. denied, 108 S.Ct. 2915 (1988):

> When assessing a decision not to investigate, we must make 'every
>
> (continued...)

In so holding, the Eleventh Circuit Court

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7. (...continued)
effort . . . to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time.' Strickland v. Washington, 466 U.S. at 689. Counsel need not 'pursue every path until it bears fruit or until all available hope withers.' Solomon v. Kemp, 735 F.2d 395, 402 (11th Cir. 1984) (quoting Lovett v. Florida, 627 F.2d 706, 708 (5th Cir. 1980)); see also Washington v. Watkins, 655 F.2d 1346, 1356 (11th Cir. Unit A 1981), cert. denied, 456 U.S. 949 (1982). The appropriate legal standard is not error-free representation, but 'reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.' Strickland v. Washington, 466 U.S. at 691, 104 S.Ct. at 2066; see also Darden v. Wainwright, 477 U.S. 187 (1986). Accordingly, it is necessary to review those factors that influenced [counsel's] decision to forego further investigation . . .

Under this standard, counsel's decision to cease his considerable investigation of the Massiah violation in Petitioner's case -- an entirely fruitless investigation due to the State's successful concealment of the necessary evidence -- was eminently reasonable. Those formidable efforts, and their futility, are detailed in Mr. McCleskey's Petition for Writ of Certiorari at 8-14, 29-30 n.16, and will not be repeated here.

of Appeals applied a "strict liability" standard to gauge the performance of habeas counsel -- "the principle that in some cases the defendant may be held liable, although he . . . has not . . . departed in any way from a reasonable standard of intent or care." W. Prosser, Law of Torts § 75 at 494 (4th ed. 1971). Under the ruling in McCleskey, habeas counsel has the burden of conducting more than reasonable investigation, more than competent investigation, and more than diligent investigation: counsel must conduct successful investigation -- regardless of the impediments strewn in his or her path -- or forever relinquish a claim. The repeated early efforts of Petitioner's counsel to secure factual support for his Massiah claim, all thwarted by State misconduct and concealment of the evidence, see Petition for Writ of Certiorari at 8-14, were insufficient for abuse of the writ purposes simply because they were unsuccessful, according to McCleskey.

Concededly, a more exhaustive investigation, in which every person who

remotely might have known of the facts establishing Petitioner's Massiah violation was interviewed, might have uncovered the evidence earlier.[8] However, such an investigation has never before been required in any other criminal law context where counsel fails to discover evidence. The consequences of counsel's failure to discover the factual basis for a claim is never gauged simply by demonstrating that, through a more extensive investigation, counsel could have discovered the evidence. Instead, the question is whether counsel should have

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8. For the argument that the evidence was simply undiscoverable, see footnote 6, supra. In Petitioner's case, a thoroughly exhaustive investigation would have required interviewing hundreds of jailers in an indiscriminate attempt to find the one who might have information, see Petition for Writ of Certiorari at 10-11 n.6, even before the critical fact raising suspicions of a Massiah violation -- the 21 page statement of informer Offie Evans -- had been revealed. The statement was discovered only after a change in Georgia's Open Records law which occurred after the first federal habeas proceeding. See footnote 6, supra. Before he had the statement, ccunsel did in fact track down and interview the few jailers whom he was told would be most knowledgeable about the situation. Petition for Writ of Certiorari at 10.

undertaken the additional investigation necessary to find the evidence, measured by a "reasonableness" or "due diligence" standard. The McCleskey court omitted this crucial analytical step, and instead established a new rule requiring habeas counsel to "pursue every path until it bears fruit or until all available hope withers." Solomon v. Kemp, 735 F.2d 395, 401 (11th Cir. 1984)(quoting Lovett v. Florida, 627 F.2d 706, 708 (5th Cir. 1980)).

This requirement -- strict liability for failure to discover evidence regardless of the reasons for that failure -- is unprecedented, at odds with governing abuse of the writ principles, and unworkable. In no other criminal law context is counsel required to meet such a standard of performance. For example, in representing a criminal defendant, counsel's performance need only be reasonable. Strickland v. Washington, 466 U.S. 668 (1981). To secure a new trial on the basis of evidence newly discovered after trial, counsel need only show that his or her failure to discover

the evidence earlier was not due to a failure to exercise due diligence. See 3 A. Amsterdam, Trial Manual 5 for the Defense of Criminal Cases § 457, at 281-82 (1989)(noting that the due diligence standard is a "time-honored" component of the criteria for obtaining a new trial based on newly discovered evidence). To overcome a procedural default created by counsel's ignorance of facts material to a claim, counsel need only "show[] that the factual . . . basis for a claim was not reasonably available to counsel. . . ." Murray v. Carrier, 477 U.S. 478, 488 (1986); see also Amadeo v. Zant, 486 U.S. ___, 108 S.Ct. 1771 (1988)(applying the Carrier rule).

Moreover, settled abuse of the writ principles are manifestly in conflict with a strict liability performance standard. Ironically, the McCleskey court itself cited these long-standing principles, before ignoring them:

> Once the state has alleged abuse of the writ, the petitioner must be afforded the opportunity to justify

his previous failure to raise the claim. In deciding whether a petitioner has presented sufficient justification, courts have required the petitioner to show that he did not deliberately abandon the claim and that his failure to raise it was not due to inexcusable neglect. See Woodard v. Hutchins, 464 U.S. 377, 379, 104 S.Ct. 752, 753, 78 L.Ed.2d 541 (1984)(per curiam)(Powell, J., concurring, joined by four other justices); Demps v. Dugger, 874 F.2d 1385, 1391 (11th Cir. 1989), petition for cert. filed, No. 89-5277, 1989 WL 113448 (Aug. 4, 1989); Witt v. Wainwright, 755 F.2d 1396, 1397 (11th Cir.), cert. denied, 470 U.S. 1039, 105 S.Ct. 1415, 84 L.Ed.2d 801 (1985); Potts v. Zant, 638 F.2d 727, 740-41 (5th Cir. Unit B 1981), cert. denied, 454 U.S. 877, 102 S.Ct. 357, 70 L.Ed.2d 187 (1981).

McCleskey, 890 F.2d at 347. This standard, as interpreted by the Eleventh Circuit prior to McCleskey, forgives federal habeas counsel's failure to raise a claim in a prior federal petition when the legal or factual basis of the claim was unknown, so long as "reasonably competent counsel" would not have been aware of the basis for the claim. Moore v. Zant, 885 F.2d 1497, 1506 (11th Cir. 1989)(en banc). Counsel who, like Petitioner's counsel, (1) conducts a reasonable, though less than fully

exhaustive, investigation, see footnote 5, supra; (2) fails as a result to discover the facts necessary to establish a claim, see id. and footnote 6, supra; and (3) for this reason does not raise the claim in an earlier petition, see Petition for Writ of Certiorari at 12, should not and cannot be held to have abused the writ or deliberately abandoned the claim[9] when facts material to the claim -- which had been hidden by the State -- are later discovered and the claim is immediately presented in a subsequent petition.

The strict liability standard is also at odds with the equitable underpinnings of federal courts' power to dismiss habeas corpus petitions. See McCleskey, 890 F.2d at 346. "In cases of abuse of the writ, equity counsels against allowing 'needless piecemeal litigation' or 'collateral proceedings whose only purpose is to vex, harass, or delay.'" Id. (citation omitted). Conversely, equity must require that petitioners be permitted to

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9. See Petition for Writ of Certiorari at 29-30.

present successive petitions which do not constitute needless piecemeal litigation or are not filed only to vex, harass, or delay. Equitable principles dictate that, in some circumstances, federal courts be willing to find that a habeas petitioner's counsel had previously done "enough" to investigate a claim, such that failure to discover facts substantiating the claim earlier does not bar successive presentation of the claim upon ultimate discovery of the necessary facts.

The imposition of a strict liability performance standard for habeas counsel is not only unprecedented and contrary to governing principles of law, it is also utterly impossible to accommodate. If the Eleventh Circuit Court of Appeals' analysis in McCleskey is the law, the task of habeas counsel in investigating potential constitutional claims is staggering. Every potential claim depending on non-record evidence in every case must be investigated until substantiating evidence is found (even if that evidence is being hidden by the

State), or until there is no other conceivably material witness to interview or conceivably material document to obtain.[10] Even then, habeas counsel cannot abandon the claim, because such abandonment would foreclose future litigation of the claim if new, unthought-of evidence thereafter became available. No lawyer providing zealous representation to a death-sentenced inmate could take such a risk. Thus, the notion of reasonable attorney judgments about the scope of investigation and the viability of claims will evaporate, and, with its demise, the cost of litigating each death penalty habeas case will go up exponentially.[11]

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10. In Petitioner's case, this would have required interviewing several hundred jailers who worked at the Fulton County Jail where Petitioner was incarcerated, because the key document suggesting a Massiah violation was persistently withheld by the State. See Petition for Writ of Certiorari at 10-11 n.6.

11. In addition to monetary costs, the burden on federal courts reviewing habeas petitions, and volunteer attorneys presenting them, will increase substantially. By essentially prohibiting abandonment of non-record evidence claims, the McCleskey rule (continued...)

Under the McCleskey strict liability standard, every case will now consume far more resources than are presently available. It is impossible to determine the long-term consequences of such a rule, but, for the present, radical changes will be required in the operation of the amici curiae Resource Centers in the Eleventh Circuit. The number of cases in which amici curiae provide assistance to volunteer counsel necessarily will be severely reduced, so that resources can be focussed on attempting to comply with the strictures of McCleskey in at least some

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11. (...continued)
will force the courts and counsel to wade through numerous as yet unsubstantiated claims in every federal habeas petition. Moreover, presenting such claims will pose an ethical dilemma for volunteer counsel. Counsel cannot comply with the mandate of McCleskey to continue presenting claims with no factual support and the mandate of Fed.R.Civ.P. 11, requiring counsel to certify that claims presented to the federal court are "well grounded in fact." Volunteer counsel will be forced to choose between the life of a death-sentenced prisoner and the possibility of severe sanctions for unethical conduct. These burdens on counsel and the courts are critical components of the "cost" equation which must be considered in evaluating the McCleskey standard.

cases. Investigative resources and staff attorney time now available to all volunteer counsel will be redirected to this reduced caseload, leaving volunteer counsel to whom amici curiae Resource Centers can no longer devote resources to fend for themselves, without significant support from, or consultation with, the Resource Centers. Inevitably, these "abandoned" volunteer counsel will be forced to ask the federal courts for heretofore unheard of financial assistance to comply with McCleskey.[12]

Ironically, the Eleventh Circuit Court of Appeals' decision in McCleskey comes at a time of national focus on the conduct of capital federal habeas corpus proceedings. The Ad Hoc

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12. This assumes that volunteer counsel will continue to come forward. It is not unimaginable that the pool will quickly dry up when prospective volunteer counsel learn that they bear the burden of representing a death-sentenced inmate under a strict liability performance standard, and the burden of risking Fed.R.Civ.P. 11 sanctions for operating within the dictates of McCleskey. See footnote 11, supra. McCleskey may well demand too much of lawyers who provide their services as volunteers to meet a need which is universally -- but not constitutionally -- recognized.

Committee on Federal Habeas Corpus in Capital Cases of the Judicial Conference of the United States ("Powell Committee"), the American Bar Association Task Force on Death Penalty Habeas Corpus, Congress, this Court, and other federal courts have become acutely concerned about chaos, unfairness, and inefficiency in capital federal habeas corpus. The new McCleskey standard -- even if it were at all supportable as a legal principle -- has extraordinary potential significantly to magnify the chaos, unfairness, and inefficiency that currently plague these cases.

II. THE DECISION IN McCLESKEY V. ZANT, 890 F.2d 342 (11TH CIR. 1989), UNDERMINES INCENTIVES FOR STATES TO COMPLY WITH CONSTITUTIONAL MANDATES AND ENCOURAGES STATES TO CONCEAL VIOLATIONS OF CAPITAL DEFENDANTS' CONSTITUTIONAL RIGHTS BY REWARDING THEM FOR DOING SO

In its McCleskey opinion, the Eleventh Circuit Court of Appeals turned a blind eye to the State's misconduct in violating, and then concealing the violation of, Petitioner's Sixth Amendment rights. By imposing a strict liability standard for habeas counsel, the court placed the onus of Petitioner's failure to uncover the facts substantiating his Massiah claim wholly on Petitioner, even though those facts were continually concealed by the State for nine years. See Petition for Writ of Certiorari at 8-14. The inevitable result of the McCleskey ruling will be to undermine states' incentives voluntarily to comply with constitutional mandates and to encourage states to conceal violations of capital defendants' constitutional rights.

Like all constitutional principles regulating the conduct of state authorities,

those established to protect the rights of criminal defendants depend heavily upon voluntary compliance by state actors. For example, investigating police officers are expected to obey the rule of Massiah; if they do not, state prosecutors are expected either not to offer the resulting confession into evidence, or to offer the confession with disclosure to defense counsel of a possible Sixth Amendment violation. This Court has long recognized the expectation that prosecutors will disclose evidence that is favorable to the defense:

> [F]or the prosecutor's role transcends that of an adversary: he "is the representative not of an ordinary party to a controversy, but of a sovereignty . . . whose interest . . . in a criminal prosecution is not that it shall win a case, but that justice shall be done."

United States v. Bagley, 473 U.S. 667, 675 (1985) (quoting Berger v. United States, 295 U.S. 78, 88 (1935)). No one -- not criminal defendants, not the judicial system, not society as a whole -- is benefitted by creating disincentives, such as the one

created by the Eleventh Circuit Court of Appeals in McCleskey, for state actors to conform to the expectations imposed upon them by the Constitution.

The expectation that police and prosecutors will voluntarily honor the constitutional rights of criminal defendants -- and thus serve the higher goal of justice -- will be seriously undermined if McCleskey is allowed to stand. The McCleskey rule insulates police and prosecutors from the adverse consequences of their misconduct in violating, and then hiding the violation of, a defendant's rights. Rather than encouraging voluntary compliance with the Constitution, McCleskey provides an incentive not to comply. Indeed, McCleskey rewards the police and prosecutors for non-compliance so long as they conceal the constitutional violation through the course of first federal habeas proceedings, by prohibiting the habeas petitioner from later obtaining relief for the violation when it is ultimately uncovered. An important sanction for non-compliance with

constitutional mandates -- federal habeas corpus relief -- is removed by McCleskey.[13] McCleskey's tolerance of, and reward for, state non-compliance with constitutional directives will seriously impede amici curiae Resource Centers from fulfilling their ultimate purpose: to protect the

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13. The damage McCleskey will cause to the equitable balance struck by habeas corpus is well illustrated by the facts of McCleskey itself. During his first state habeas proceeding, in which Petitioner asserted his Massiah claim, Petitioner's investigative efforts were thwarted by the State's persistent concealment of the Massiah violation: (1) Although the State purported to provide Petitioner with the complete prosecutorial file, that file did not include the 21 page "transcript" of informer Offie Evans' conversations with Petitioner, which so clearly suggested a Massiah violation; (2) The prosecutor testified in a deposition that, to his knowledge, the State had no informant relationship with Evans at the time Evans allegedly obtained inculpatory statements from Petitioner; and (3) Evans himself denied such a relationship during testimony at the state habeas hearing. Moreover, when the officers involved in the Massiah violation were later interviewed, they persisted in denying any knowledge of the scheme. For the nine years the State concealed its violation of Petitioner's Sixth Amendment rights, the State was rewarded with a finding that Petitioner abused the writ by asserting his Massiah claim in a second federal habeas petition immediately after he ultimately discovered the State's misconduct.

constitutional rights of death-sentenced inmates.

Indeed, this Court has recognized the risks of a rule such as McCleskey imposes, and firmly held that state misconduct can preclude imposition of a procedural bar to consideration of the merits of a constitutional claim in the context of procedural default. In Amadeo v. Zant, 486 U.S. ___, 108 S.Ct. 1771 (1988), the Petitioner was unaware of the facts supporting a jury composition challenge because those facts were in a memorandum hidden among reams of jury lists in the clerk's office. This Court held that

> [i]f the District Attorney's memorandum was not reasonably discoverable because it was concealed by Putnam County officials, and if that concealment, rather than tactical considerations, was the reason for the failure of petitioner's lawyers to raise the jury challenge in the trial court, then petitioner established ample cause to excuse his procedural default under this Court's precedents. The situation . . . fits squarely, indeed almost verbatim, within our holdings in [Reed v.]Ross[, 468 U.S. 1 (1984)]

and [Murray v.]Carrier[, 477 U.S. 478 (1986)].

Amadeo, 108 S.Ct. at 1777.

This Court in Amadeo recognized what the Eleventh Circuit Court of Appeals failed to acknowledge in McCleskey: that if the State plays a role in making the discovery of a constitutional violation "'impracticable'" after "'reasonabl[e]'" investigative efforts by defense counsel, Amadeo, 108 S.Ct. at 1776 (quoting Murray v. Carrier, 477 U.S. 478, 488 (1986)), the State -- not the defendant -- must bear the burden of the defendant's failure to raise the claim earlier; the State -- not the defendant -- will be penalized under the procedural rules governing when the merits of a claim may be considered. If the delicate balance of our constitutional system is to be maintained, the same rule applied by this Court in the procedural default context must be applied to abuse of the writ.

CONCLUSION

For the foregoing reasons, and the reasons detailed in Mr. McCleskey's Brief of Petitioner, this Court should reverse the decision of the Eleventh Circuit Court of Appeals in McCleskey v. Zant, 890 F.2d 342 (11th Cir. 1989).

Respectfully submitted,

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Supreme Court, U.S.
FILED
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CLERK

No. 89-7024

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

WARREN MCCLESKEY,

Petitioner,

vs.

WALTER D. ZANT, Superintendent,
Georgia Diagnostic & Classification Center,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF AMICUS CURIAE OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

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QUESTIONS PRESENTED

1. Must the State demonstrate that a claim was deliberately abandoned in an earlier petition for a writ of habeas corpus in order to establish that inclusion of that claim in a subsequent habeas petition constitutes abuse of the writ?

2. If not, under what other circumstances will the raising of a new claim in a second or subsequent petition constitute an abuse of the writ?

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Respondent.

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BRIEF AMICUS CURIAE OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

INTEREST OF AMICUS CURIAE

The Criminal Justice Legal Foundation (CJLF)[1] is a nonprofit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the due process protection of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

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1. CJLF has written consent of the parties to file this brief.

The present case involves the extended relitigation of the legality of a proceeding conducted many years ago, involving no substantial question of whether respondent is actually guilty. Such unnecessary relitigation is contrary to the rights of victims and society which CJLF was formed to advance.

SUMMARY OF FACTS AND CASE

On May 13, 1978, defendant/petitioner Warren McCleskey and three accomplices robbed a furniture store, tied up the employees, and forced the manager at gunpoint to turn over the store receipts. Officer Frank Schlatt responded to a silent alarm. One of the robbers shot and killed him with a Rossi .38 caliber revolver. *McClesky* v. *State*, 263 S. E. 2d 146, 147-148 (1980).

This robbery was not McCleskey's first. He had previously committed at least two other robberies, in one of which he obtained a Rossi .38. *Id*., at 150.

A part of the evidence identifying McCleskey as the triggerman was the testimony of a jailhouse informant, Offie Gene Evans. *Ibid*. McCleskey was convicted and sentenced to death, and the Georgia Supreme Court unanimously affirmed. *Id*., at 152. The United States Supreme Court denied certiorari. *McClesky* v. *Georgia*, 449 U. S. 891 (1980). State habeas corpus was denied, and the Supreme Court again denied certiorari. *McCleskey* v. *Zant*, 454 U. S. 1093 (1981).

In December 1981, McCleskey filed a federal habeas petition asserting 18 grounds for relief. *McCleskey* v. *Zant*, 580 F. Supp. 338 (1984). Over two years later, in an exhaustive opinion occupying 66 pages of the Federal Supplement, the district court granted relief on one claim and denied relief on all the others. *Id*., at 345. The Eleventh Circuit en banc reversed the grant and affirmed all the denials. *McCleskey* v. *Kemp*, 753 F. 2d 877 (1985). The Supreme Court granted certiorari limited to the racial discrimination claim and affirmed. *McCleskey* v. *Kemp*, 481 U. S. 279 (1987).

After denial of a second state habeas petition, McCleskey filed the present federal petition. The petition included a claim, not made in the first federal petition, that Evans was a police informant and that his conversations with McCleskey in jail violated the rule in *Massiah* v. *United States*, 377 U.S. 1199 (1964). The district court granted relief on this claim and denied relief on all others in an unpublished opinion. J. A. 63-100. The Eleventh Circuit reversed, finding an abuse of the writ. *McCleskey* v. *Zant*, 890 F.2d 342, 353 (1989).

SUMMARY OF ARGUMENT

The reasons for the common law's tolerance of successive habeas petitions was closely linked to the strictly limited purpose of the common law writ. Today's writ of collateral attack is a different procedure with a different purpose, and different considerations therefore govern the permissibility of successive writs.

The considerations underlying the rule of *Wainwright* v. *Sykes*, 433 U. S. 72 (1977), regarding state procedural bars, apply with equal force to the petitioner's failure to raise an issue on the first federal petition. The cause and prejudice test with the miscarriage of justice exception should be adopted. The Eleventh Circuit's ruling in the present case effectively found no cause, no prejudice, and no miscarriage of justice and should be affirmed.

ARGUMENT

I. The common law writ has little relevance to the proceeding in this case.

Petitioner relies heavily on the common law rule that a prisoner seeking habeas relief could go from court to court without limit. Pet. Brief 26-30. This argument contains one glaring flaw. The common law writ was totally unavailable for the relief which petitioner seeks in this case: collateral attack on a felony conviction by a court of general jurisdiction. If the

common law controls this case, the petition should be summarily dismissed. If not, we need to inquire whether the rationale underlying the old rule has any application to the modern mutant writ.

The common law writ was only available as a remedy for "illegal confinement." See 3 W. Blackstone, *Commentaries* 131 (1768). In most cases, the illegal confinement consisted of imprisonment by an executive officer without judicial action. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners,* 76 Harv. L. Rev. 441, 475 (1963).[2] Executive detentions were the target of the famous Habeas Corpus Act, 31 Car. II c. 2 (1679). See Blackstone, *supra*, at 135. That act expressly excepted persons committed "for Treason or Fellony plainely expressed in the Warrant of Committment" and "persons Convict or in Execution by legall Processe." 31 Car. II c. 2 § II. The statute's mandate to discharge the prisoner did not apply if "the Party soe committed is detained upon a legall Processe Order or Warrant out of some Court that hath Jurisdiction of Criminall Matters . . . for such Matters or Offences for the which by the Law the Prisoner is not Baileable." *Ibid.* Pretrial felony detainees could invoke the act only as a remedy for a violation of the right to speedy trial. *Id.*, § VI.

The only significant use of habeas corpus as a collateral attack arose in the famous and often miscited *Bushell's Case*, 124 Eng. Rep. 1006 (1670). In that case, jurors who had been held in contempt for bringing in the "wrong" verdict in a political prosecution were held to be entitled to habeas relief, even though the contempt order was issued by a court with jurisdiction of the person and the subject matter. The *Bushell* court went out of its way, however, to distinguish a contempt case from criminal cases. "A man committed for treason or felony, and bringing a habeas corpus, hath retorn'ed upon it, that he was committed for high treason or felony; *and this is a sufficient retorn to remand him* . . . ." *Id.*, at 1009 (emphasis

2. Cited below as "Bator."

added). The distinguishing factor was that the accused criminal had adequate remedies in the usual course of procedure, while the alleged contemnor did not. *Id.*, at 1010.

The distinction so carefully marked out by *Bushell* remained well established through the colonial period. Immediately after his oft-quoted praise of the "great and efficacious writ," Blackstone notes that writs would often be denied as meritless on their face. If the writ "issued of mere course . . . a traitor or felon under sentence of death . . . might obtain a temporary enlargement by suing out a *habeas corpus*, though sure to be remanded as soon as brought up to the court." 3 Blackstone, *supra*, at 132. Such an abuse would be intolerable, "[a]nd therefore Sir Edward Coke, when chief justice, did not scruple in 13 Jac. I. to deny a *habeas corpus* to one confined by the court of admiralty for piracy; *there appearing, upon his own shewing, sufficient grounds to confine him.*" *Ibid.* (emphasis added).

One imprisoned as a punishment for crime by a court of clear jurisdiction could indeed petition every judge in the country, but he would receive the same immediate answer from every judge. The writ would not even be considered. It was simply not available for the purpose of reviewing such a judgment.

The writ was brought to America and guaranteed in our Constitution. U. S. Const. art. I, § 9. The first Congress expressly granted the federal courts power to issue the writ. Judiciary Act § 14, 1 Stat. 81 (1789). The common law limitation remained, however. "An imprisonment under a judgment cannot be unlawful, unless that judgment be an absolute nullity; and it is not a nullity if the court has general jurisdiction of the subject, although it should be erroneous." *Ex parte Watkins*, 3 Pet. (28 U. S.) 193, 203 (1830).

"Abuse of the writ," in the sense that the phrase is used today, was thus controlled by the limited nature of the writ. Questions of the legality of imprisonment before trial or without trial could arise only as long as that imprisonment lasted. The accused was entitled to a speedy trial, U. S. Const.

amend. VI, and a legal pre-trial confinement would normally not last long enough to be the subject of numerous petitions.

Even though lengthy imprisonment replaced death as the penalty for the most felonies in the first half of the nineteenth century, see *Furman* v. *Georgia*, 408 U.S. 238, 338 (1972) (opn. of Marshall, J.), the problem of abuse still did not arise, because of the rule stated in *Watkins*. Courts with jurisdiction to try felonies were courts of general jurisdiction. "The judgment of the circuit court, in a criminal case, is, of itself, evidence of its own legality .... The law trusts that court with the whole subject, and has not confided to this court the power of reviewing its decisions." *Watkins*, *supra*, 3 Pet., at 207.

The limitation recognized in *Watkins* remained unchanged and was generally understood to be in force in 1867. In that year, Congress extended the federal writ to state prisoners detained in violation of federal law, but gave no indication that it intended to change the *Watkins* rule. Bator, *supra* n. 2, 76 Harv. L. Rev., at 474-77; *Schneckloth* v. *Bustamonte*, 412 U. S. 218, 253 (1973) (Powell, J., concurring).

The development of habeas corpus as a device to relitigate convictions of crime already decided by courts of competent jurisdiction was entirely a judicial invention after the 1867 act. It began with the idea that the imposition of both fine and imprisonment, under a statute authorizing only one or the other, was beyond the "jurisdiction" of the Court. *Ex parte Lange*, 18 Wall. (85 U. S.) 163, 176 (1874). It was further expanded with the holding that a federal court has no jurisdiction to try an "infamous" crime without an indictment. *Ex parte Wilson*, 114 U. S. 417, 429 (1885). The outer limit of nineteenth century collateral attack was reached in *Ex parte Siebold*, 100 U. S. 371 (1880). On the theory that an unconstitutional statute is absolutely void, it was held that the constitutionality of the statute creating the offense could be reconsidered on habeas. *Id.*, at 376-377. The rule was still in force, though, that errors of procedure could not be collaterally attacked, even if they rose to constitutional stature. *In re Belt*, 159 U. S. 95 (1895) (validity of jury waiver statute); *Matter of Moran*, 203 U. S. 96, 105 (1906) (allegedly

forced self-incrimination not "jurisdictional").

Inquiry into procedural error was made available in the twentieth century to meet an overriding need. Black defendants were being wrongfully convicted due to infection of the system by racial prejudice, and direct review by this Court was insufficient to correct the injustices. See Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. Chi. L. Rev. 142, 154-155 (1970);[3] Bator, *supra* n. 2, 76 Harv. L. Rev., at 523. In *Moore* v. *Dempsey*, 261 U. S. 86 (1923), for example, the petitioners had been convicted in a mob-dominated trial, and the state corrective process had made no serious inquiry into the due process issue. *Id.*, at 87-90; cf. *Frank* v. *Mangum*, 237 U. S. 309, 333-336 (1915) (state court carefully considered question and decided trial was not mob-dominated). Finally, in *Brown* v. *Allen*, 344 U. S. 443 (1953), the Court addressed the merits of Black petitioners' jury discrimination claims, with only one Justice contending that the state court's resolution of the issue be accepted as final. *Id.*, at 545 (Jackson, J., concurring). Unlimited review has been the norm from *Brown* until very recently. See *Butler* v. *McKellar*, 110 S. Ct. 1212, 1224-1225, 108 L. Ed. 2d 347, 365-366 (1990) (Brennan, J., dissenting).

The present habeas corpus proceeding is petitioner's fourth. It is the fifth review of his judgment of conviction.[4] The common law which he seeks to invoke would not have considered even his first petition, much less his fourth. Petitioner seeks to have his cake and eat it too, invoking the common law tradition of the Great Writ when it suits his purpose, while at the same time using the writ for a purpose strictly forbidden by that same tradition.

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3. Cited below as "Friendly."

4. His case has previously been reviewed on direct appeal, two state habeas petitions, and one federal petition.

The common law therefore does not provide the answer. To determine what limits on successive applications are proper, it is necessary to reexamine the successive writ cases in the context of the massive change in the function of the writ which was occurring at the same time.

II. The standards established under *Wainwright* v. *Sykes* and its progeny should govern abuse of the writ as well as procedural default.

A. Successive Petitions Before 1963.

The first substantial post-Reconstruction discussion on repetitive applications is in *Ex parte Cuddy*, 40 F. 62 (1889). Cuddy was held in contempt for attempting to improperly influence a juror. According to his second petition, the transaction took place a quarter mile from the courthouse. *Id.*, at 63. Cuddy contended that his actions were not in the presence of the court, and therefore the court had no contempt jurisdiction. The relevant statute provided "that such power to punish contempts shall not be construed to extend to any case except the misbehavior of any person in their [the courts'] presence, or so near thereto as to obstruct the administration of justice . . . ." *Ibid.*, quoting from Rev. Stat. § 725.

The Supreme Court decided Cuddy's first petition on the same day it decided a similar case, *Ex parte Savin*, 131 U. S. 267 (1889).[5] Savin had attempted to bribe a witness in the jury room and again in the hallway. *Id.*, at 269. The *Savin* Court decided that "presence" was not limited to the personal presence of the judge but instead extended throughout the courthouse. *Id.*, at 277.

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5. Both cases were argued April 25, 1889, and decided May 13, 1889. See 131 U. S. 267, 280.

Cuddy's first petition was limited to conclusory allegations of lack of jurisdiction supported only by the records of the contempt proceeding. *Ex parte Cuddy*, 131 U. S. 280, 281-283 (1889). From the contempt order it may be fairly inferred that Cuddy's actions did not occur in the personal presence of the judge, see *id.*, at 281-282, but neither the petition nor the record indicate whether Cuddy approached the juror in the courthouse or elsewhere. *Id.*, at 284. Looking only at their wording of the statute, there was no reason to expect that the specific location would be important. Cuddy knew the facts but had no reason to realize their legal significance until the issue arose in *Savin*. The Supreme Court affirmed denial of relief. *Id.*, at 287.

The second application was made to Justice Field as circuit justice. After discussing other possible grounds for decision, Justice Field based his denial squarely on the ground of the prior petition.

> "If [petitioner] can renew [his application] on another record, which may also be in some other particular defective, and so on indefinitely whenever he fails on appeal, it is plain that the writ may often become an instrument of oppression, instead of a means of relieving one from an unjust and illegal imprisonment. The writ of *habeas corpus*, it is true, is the writ of freedom, and is so highly esteemed that by the common law of England applications can be made for its issue by one illegally restrained of his liberty to every justice of the kingdom having the right to grant such writs.
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> * * *
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> "In many instances great abuses have attended this privilege, which have led in some of the states to legislation on the subject. And, in the absence of such legislation, while the doctrine of *res judicata* does not apply, it is held that the officers before whom the second application is made may take into consideration of the fact that a previous application had been made to another officer and refused; and *in some instances that fact may justify a refusal of the second.*

* * *

"In what I have said I refer, of course, to cases where a second application is made upon the same facts presented, *or which might have been presented*, on the first. The question is entirely different when *subsequent occurring events* have changed the situation of the petitioner so as in fact to present a new case for consideration. In the present application there are *no new facts which did not exist* when the first was presented. And under the law of the United States an appeal is allowed to the supreme court where the writ is refused,—*a provision which would seem to have been adopted to prevent a second application upon the same facts which were or might have been presented in the first instance*. I am of the opinion that in such a case a second application should not be heard, except where the judgment of affirmance by the supreme court is rendered without prejudice to, or with leave to make a new application by, the petitioner." *Id.*, at 65-66 (emphasis added).

Cuddy thus holds that as a general rule the first petition must present all facts in support of the petition which can be presented. There must be some good reason why the facts were not presented the first time to avoid a dismissal of the second petition. Significantly, there is no hint of a requirement that the petitioner's conduct has been inequitable in the sense that he is coming to the court with unclean hands. Cf. *Sanders* v. *United States*, 373 U. S. 1, 17-18 (1963). The lack of a good reason for not presenting the evidence on the first petition is sufficient to deny the writ.

Nonexistence of the supporting facts at the time of the first petition is obviously a good enough reason. The failure of the petitioner to recognize their legal significance was not good enough in *Cuddy*, however, despite the fact that the legal significance arose upon a subsequent and rather strained construction of the statute by the Supreme Court. Cuddy appears to have been represented by counsel throughout the proceedings, see 131 U. S., at 281, and that fact may have had

a bearing on the decision. Cf. *Price* v. *Johnston*, 334 U. S. 266, 291 (1948) (*pro se* petitioner).

In *Salinger* v. *Loisel*, 265 U. S. 224 (1924), the Supreme Court held that a prior habeas petition was not res judicata but that the common law rule of "independent judgment on each successive application" was no longer in effect. *Id.*, at 230-231. The mandate of Congress "to dispose of the party as law and justice may require" meant that the availability of appellate review and denial of prior habeas relief could "be considered, and even given controlling weight." *Id.*, at 231. *Salinger* quoted *Cuddy*, *supra*, with approval. *Id.*, at 231-232. Thus, the denial of a prior petition occupies some vaguely defined middle ground. It is less than res judicata, but a prior denial carries much more than the zero weight which it carried at common law.

Wong Doo v. *United States*, 265 U. S. 239 (1924) was decided the same day as *Salinger*. Wong Doo's first petition presented two grounds, but he put on no proof of the second. He then relied on the second ground for his second petition. *Id.*, at 239-240. The Supreme Court held that the lower court erred in invoking the rigid bar of res judicata but that the case was so clearly an abuse of the writ that no remand was necessary. *Id.*, at 241. The Court believed that the evidence "was accessible all the time," *ibid.*, and Wong Doo was apparently represented by counsel. The Court notes that under these circumstances good faith required presentation of the proof on the first petition and that reserving the proof for a later petition was in bad faith and abusive. It does not follow, however, that this kind of bad faith is the only form of abuse of the writ or the only circumstance in which denial of the prior petition is sufficient to deny the present one. The much broader language of *Cuddy* and *Salinger* is in no way

rejected in *Wong Doo*.[6]

The next major statement on abuse of the writ came in *Price* v. *Johnston*, 334 U. S. 266 (1948).[7] The main issue in *Price* was which party had the burden of pleading abuse or nonabuse of the writ in a successive petition. Four Justices thought that the petitioner should state the reasons in his petition. *Id.*, at 294 (Frankfurter, J., dissenting); *id.*, at 297 (Jackson, J., dissenting). The majority placed the burden of pleading abuse on the government, with reasoning based squarely on the *pro se* status of petitioners "often unlearned in the law." *Id.*, at 291-292.

On the merits of the successive petition issue, the Court distinguished *Salinger* and *Wong Doo* as cases where the prior petition had raised the same issue. *Id.*, at 289-290. The majority contradicts itself, however, on the effect of a prior petition raising a different issue. At one point, the majority says "the three prior refusals to discharge petitioner can have *no* bearing or weight on the disposition to be made of the new matter raised in the fourth petition." *Id.*, at 289 (emphasis added).

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6. Because *Wong Doo* was a deportation case rather than an imprisonment case, it contains a comment which is particularly relevant to capital cases. The Court notes that abusive use of the writ could "postpone the execution of the order indefinitely" and that it "already has been postponed almost four years." *Ibid.*; cf. *Barefoot* v. *Estelle*, 463 U.S. 880, 888 (1983).

7. Two cases decided in the interim are cited by petitioner: *United States ex rel. McCann* v. *Adams*, 320 U. S. 220 (1942) and *Waley* v. *Johnston*, 316 U. S. 101 (1942). Both of these are brief per curiam opinions in cases where the abuse of the writ issue was conceded by the government in this Court. They therefore lack the adversarial process that is essential to the making of sound precedent. See *Cross* v. *Burke*, 146 U. S. 82, 86-87 (1892).

This is an extreme statement. If the prior refusals really had *no* bearing, there would be no abuse issue and the case would have been remanded for an immediate hearing on the merits. Instead, the Court explicitly directed that the abuse of the writ issue be considered on remand. *Id.*, at 294. Another passage of the opinion is much more consistent with the actual disposition of the case:

> "If called upon, the petitioner may be able to present *adequate reasons* for not making the allegation earlier, reasons which make it *fair and just* for the trial court to overlook the delay. *The primary purpose of a habeas corpus proceeding is to make certain that a man is not unjustly imprisoned.* And if for some *justifiable reason* he was previously unable to assert his rights or unaware of the significance of relevant facts, it is neither necessary nor reasonable to deny all opportunity of obtaining judicial relief." *Id.*, at 291 (emphasis added).[8]

This holding is entirely different from the earlier statement and is entirely in keeping with the spirit of *Cuddy*, *Salinger*, and *Wong Doo*. The denial of a prior petition is *not* without effect. Its effect is to place upon the petitioner, once the issue has been raised, the burden of showing reasons for not making the allegation earlier. The petitioner's showing must clear two hurdles. First, the reasons shown must be adequate, and second, the circumstances must be such that it is fair and just that the second or subsequent petition be considered. In other words, he must show cause and prejudice. Cf. *Wainwright* v. *Sykes*, 433 U. S. 72, 87 (1977).

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8. This discussion is in the portion of the opinion dealing with facts known to the petitioner. The Court does not discuss in any depth the circumstances under which newly discovered facts will justify a second petition.

B. The Modern Law of Procedural Default.

1. Fay v. Noia and Sanders v. United States.

The modern law of procedural default on habeas begins with a pair of cases decided several weeks apart: *Fay* v. *Noia*, 372 U. S. 391 (1963) and *Sanders* v. *United States*, 373 U. S. 1 (1963). *Noia* involved a claim of involuntary confession which was barred on state collateral review due to Noia's failure to appeal. After an extensive review of the history of habeas corpus, the Court concluded that "the jurisdiction of federal courts on habeas corpus is not affected by procedural defaults . . . during the state court proceedings," with the caveat that "the federal habeas judge may in his discretion deny relief to an applicant who has deliberately by-passed the orderly procedure of the state courts." *Id.*, at 438.

Sanders involved a federal prisoner who had filed a second motion under 28 U. S. C. § 2255. The first petition had stated bare conclusions unsupported by facts and was dismissed. The case was arguably different from *Noia* in that it involved a federal prisoner, rather than state, and the default in question was failure to raise the point on the first collateral attack, rather than failure to object at trial or on direct appeal. See *Sanders*, 373 U. S., at 5-6.

The *Sanders* Court identified two different "abuse of the writ" problems. One situation, the one involved in the case, involves an attempt to relitigate an issue contained in the previous petition, though perhaps not resolved on the merits. 373 U. S., at 15-17. The second situation involves the new claim, and the *Sanders* Court's ruminations on this point are pure dicta. The Court decided not to "deal at length" with this issue and simply stated that *Fay* v. *Noia* and a companion case, *Townsend* v. *Sain*, 372 U. S. 293 (1963), "deal at length with the circumstances under which a prisoner may be foreclosed from federal collateral relief. The principles developed in those decisions govern equally here." *Sanders*, 373 U. S., at 18.

Thus the *Sanders* Court itself disclaimed any difference between presenting a new ground not raised in a previous federal petition and presenting a ground procedurally defaulted in the state system. Both situations balance the same opposing interests, finality versus opportunity to have the claim heard, and both are to be governed by the same standard.

Subsequent development in the law of state procedural defaults has caused the *Sanders* dictum to become ambiguous. *Sanders* can be read to say that "deliberate bypass" is the standard, or it can be read to say that the standard is the same as for state procedural defaults. The two are no longer the same.

2. The Cause and Prejudice Test.

Ten years after *Noia* and *Sanders*, the "deliberate bypass" standard set in those cases began to decline. In *Davis* v. *United States*, 411 U. S. 233 (1973), a § 2255 petitioner challenged as racially discriminatory the composition of the grand jury which had indicted him. Davis had not challenged the grand jury by pretrial motion, as required by Federal Rule of Criminal Procedure 12(b)(2). The Court held that the rule was an express waiver provision enacted by Congress and therefore could not be defeated by permitting the waived claim to be raised on collateral attack. 411 U. S., at 242.

Davis emphasized the importance of raising the objection before trial in order to allow the trial judge to make the correction, if necessary. If the defendant makes a timely challenge, "inquiry into an alleged defect may be concluded and, if necessary, cured before the court, the witnesses, and the parties have gone to the burden and expense of a trial." 411 U. S., at 241.

In *Francis* v. *Henderson*, 425 U. S. 536 (1976), the Court was presented with a state prisoner seeking habeas in circumstances otherwise identical to *Davis*. The practical interests involved were the same. Prompt raising of the objection would have allowed prompt correction. The

governmental interests, though, were quite different. The state procedural rule, unlike the federal rules, did not emanate from the same authority that had enacted the habeas statutes. On the other hand, a federal writ of habeas corpus for a state prisoner involves considerations of federal/state comity not involved in a § 2255 proceeding. Notwithstanding these differences, *Francis* adopted the *Davis* cause and prejudice test. *Id.*, at 542. Although the *Francis* majority did not explicitly overrule *Fay* v. *Noia*, despite a challenge from the dissent to state its position explicitly, *id.*, at 546-47 (Brennan, J., dissenting), the result is clearly inconsistent with *Noia*'s "deliberate bypass" standard.

The cause and prejudice test was extended beyond grand jury challenges in *Wainwright* v. *Sykes*, 433 U. S. 72 (1977). Petitioner had not objected at trial to the admission of a statement taken without *Miranda* warnings and had not raised the issue on appeal. Florida rules required the suppression motion to be made before trial in most cases. *Id.*, at 76, n. 5. *Sykes* followed *Francis* and applied the cause and prejudice test to failure to object to a confession at trial. Unlike *Francis*, the *Sykes* Court made its rejection of "the sweeping language of *Fay* v. *Noia*" explicit. *Id.*, at 87-88.

The *Sykes* Court repeated the same practical considerations stated in *Francis* and *Davis*. A contemporaneous objection at trial is needed to identify, determine, and if necessary, correct the problem and then proceed with the trial. *Id.*, at 88-89. The *Sykes* Court was also concerned with the possibility of "sandbagging." An objection might be withheld for the purpose of getting two bites at the apple. A defendant might be acquitted, or receive a light sentence, at the first trial. If not, and if reversible error is introduced and the conviction vacated years later, defendant will get a second trial on stale evidence. *Id.*, at 89. A contemporaneous objection rule thus requires the defense to concentrate its energies on insuring that the first trial is free of error, not the opposite. *Id.*, at 90.

In addition to the above considerations, the *Sykes* Court discussed the idea that a procedural default is an independent state ground for the decision. A state may constitutionally

require that an objection be raised at a certain point or waived, the argument goes, and thus the affirmance of the conviction rests on the adequate state ground of waiver, not the federal ground of the lack of merit of the objection itself. *Id.*, at 81-82. If independent state grounds were really the basis of *Sykes*, though, the cause and prejudice test would not apply. The lack of a federal question is jurisdictional, not discretionary. See *Herb* v. *Pitcairn*, 324 U. S. 117, 125-126 (1945). If the state ground were, by itself, sufficient to support the judgment, federal courts would have no power to interfere, cause or no cause, prejudice or no prejudice. See *Harris* v. *Reed*, 109 S. Ct. 1038, 1052-1053, 103 L. Ed. 2d 308, 328-329 (1989) (Kennedy, J., dissenting).[9] Because *Francis* and *Sykes* lay down a rule governing the judicious use of power rather than the limitations of power, see *Francis*, 425 U. S., at 538-39, the ground cannot be a jurisdictional one.

The cause and prejudice test was extended to a case involving neither federalism nor Rule 12(b) in *United States* v. *Frady*, 456 U. S. 152 (1982). Frady had been convicted of murder in the United States District Court for the District of Columbia. Frady brought a § 2255 motion, claiming for the first time that the jury instructions had incorrectly defined "malice," *id.*, at 157-58, n. 6, citing two cases decided four and seven years, respectively, after his trial, *ibid.*

The Court of Appeals held that the error had to be considered on a § 2255 motion if it met the "plain error" standard of Federal Rule of Criminal Procedure 52(b), the standard applied on appeal for most errors not objected to at trial. This Court reversed.

The *Davis* holding that rules on habeas could be no more lenient than those on appeal did not imply that they could be

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9. The *Harris* majority relies on the independent state grounds "lineage" of *Sykes* for its "plain statement" rule, *id.*, at 1042, L. Ed. 2d, at 315, but in the end the majority returns to an interest and burden analysis. *Id.*, at 1044, L. Ed. 2d, at 318.

no more stringent. 456 U. S., at 164. While the *Davis* Court had decided that the rules for preserving an objection for appeal established a floor for considering the issue on habeas, the *Frady* Court rejected the contention that the appellate rules could establish a ceiling. Respect for finality of judgments permits the judicial creation of a standard for habeas higher than the one created for appeal by the rules. The cause and prejudice standard of *Davis, Francis,* and *Sykes* was held to be the proper balance between society's interest in finality and the petitioner's interest in belatedly asserting his claim. 456 U. S., at 166-67.

3. Defaults After Trial.

All of the cases from *Davis* to *Frady* had involved failure to object at trial. The primary open question remaining was whether the cause and prejudice standard also applied in the event of failure to raise an issue on appeal. This issue was addressed in *Reed* v. *Ross*, 468 U. S. 1 (1984). Ross had failed to object to a burden-shifting jury instruction at trial, but the state had no contemporaneous objection rule at the time. *Id.*, at 7, n. 4. He also failed to raise the issue on appeal. The Court saw no reason to apply a different standard on that basis.

> "This type of rule [requiring legal issues to be raised on appeal or waived] promotes not only the accuracy and efficiency of judicial decisions, but also the finality of those decisions, by forcing the defendant to litigate all of his claims together, as quickly after trial as the docket will allow, and while the attention of the appellate court is focused on his case. To the extent that federal courts exercise their § 2254 power to review constitutional claims that were not properly raised before the state court, these legitimate state interests may be frustrated: evidence may no longer be available to evaluate the defendant's constitutional claim if it is brought to federal court long after his trial: and it may be too late to retry the defendant effectively if he prevails in his collateral challenge. *Id.*, at 10-11.

If any doubt remained that the same test applied for both trial and appellate defaults, it was eliminated in *Murray* v. *Carrier*, 477 U. S. 478, 490-92 (1986).

4. Successive Federal Petitions.

Looking at the cause and prejudice cases as a group, we see that only one common thread runs through all of them. In each case, the interest of the petitioner in having his claim heard must be balanced against the interest of the state in having the issue raised at the earliest possible stage of the proceedings. While explicit federal and state rules are involved in most of the cases, only one case, *Davis*, actually involves a rule with a "cause" exception and none involve rules with an explicit "prejudice" requirement to invoke the exception. *Frady* does not involve any explicit procedural rule at all. The cause and prejudice standard is not based on a respect for procedural rules as such but on a recognition of the needs underlying these rules, a respect for the finality of judgments, and a belief that there must, at some point, be an end to litigation.

The interests to be balanced were neatly summed up in *Reed* v. *Ross*. "On the one hand, there is Congress' expressed interest in providing a federal forum for the vindication of constitutional rights of state prisoners .... On the other hand, there is the State's interest in the integrity of its rules and proceedings and the finality of its judgments." *Reed*, 468 U. S., at 10. To determine whether the balance results in the same cause and prejudice test in the present case, we must examine both sides of this equation.

In one sense, the state's interest in enforcing procedural defaults grows weaker as the time after trial increases. There is a great deal of difference between avoiding retrial altogether, as objection at trial may do, and merely hastening the retrial, as an objection on appeal or on the first habeas petition may do. In another sense, though, the interest in finality increases with time. Society, the victim or next-of-kin, and arguably even the defendant need to have a final answer at some point. See *Mackey* v. *United States*, 401 U. S. 667, 690-

691 (1971) (Harlan, J., dissenting).[10] With each additional procedure that is permitted, that final day when all can say "it's over" is further postponed. We must, of course, accept direct appeal as a necessary delay and expense to guard against conviction of the innocent. Then there is state collateral attack. Then there is federal habeas. The frustration builds as attack after attack raises anew the possibility that a guilty person may escape justice and as the probability that the defendant is in fact innocent shrinks far below reasonable doubt into the infinitesimal.

Meanwhile the evidence for retrial grows more and more stale. Memories fade; witnesses die or disappear; physical evidence deteriorates or is lost. The ability to conduct a trial which is fair to society and to the victim, as well as to the defendant, decays with time. New trials are ordered on the theory, or at least the hope, that the second trial will determine the truth more reliably than the first. As time marches on that hope becomes a pipe dream.

The state's interest in having claims which were omitted from the first petition barred from consideration on subsequent petitions may be less than its interest in a contemporaneous objection rule in some respects, but it is greater in others. If all claims must be made in the first petition, absent cause and prejudice, most cases will have a definable end — the final disposition of the first federal petition. That is an important interest indeed. It is especially important in capital cases, where the execution of the sentence cannot begin until the end of proceedings is reached. See *Barefoot* v. *Estelle*, 463 U. S. 880, 888 (1983).

On the other side of the coin is the petitioner's interest in a federal forum for his federal claim. This interest is far less compelling on successive petitions. Even if we assume the

10. This is true even in capital cases. The long wait on death row can be a form of psychological torture. See *People* v. *Anderson*, 6 Cal.3d 628, 649, n. 38, 493 P.2d 880 (1972).

deep suspicion of state courts underlying this interest to be valid,[11] it is one thing to say that the petitioner must be allowed entrance to the federal courthouse and quite another to insist that he has a right to take up residence there. The cause and prejudice test merely requires the petitioner to show that he has a very good reason for not raising his claim earlier, see, *e.g.*, *Amadeo* v. *Zant*, 486 U. S. 214 (1988) (evidence of intentional racism in jury selection concealed by the prosecution), and that the claim involves an error which really made a difference. Finally, there is the safety valve recognized in *Murray* v. *Carrier*, *supra*, 477 U. S., at 496, for the "extraordinary case, where a constitutional violation has probably resulted in the conviction of one who is actually innocent."

The balance between finality and the federal forum thus tips at least as far in the government's favor in this case as it did in *Frady*, *Reed*, or *Carrier*, perhaps further. The cause and prejudice standard is the appropriate one to apply.

C. Statutory Language and History.

In the order granting certiorari in this case, the Court requested briefing on this question: "Must the State demonstrate that a claim was deliberately abandoned in an earlier petition for a writ of habeas corpus in order to establish that inclusion of that claim in a subsequent habeas petition constitutes an abuse of the writ?" J. A. 136.

The negative answer is plain on the face of the statute. The applicant must satisfy the court that he "has not on the earlier application deliberately withheld the newly asserted ground *or otherwise abused the writ*." 28 U. S. C. § 2244(b) (emphasis added). If deliberate withholding or abandonment were the only kind of abuse of the writ, the "otherwise" clause would not be there. See *Bowsher* v. *Merck & Co., Inc.*, 460 U. S. 824,

11. But see *Sawyer* v. *Smith*, 110 S. Ct. 2822, 2831, 111 L. Ed. 2d 193, 210 (1990).

833 (1983) (give effect to every word if possible). The petition need not be entertained if it is an abuse of the writ. Deliberate withholding is one kind of abuse, but there are others. Congress has not specified what the others are, but it has unambiguously stated that other forms of abuse exist.

Justice Scalia has explained the dangers of resorting to legislative history. See *Blanchard* v. *Bergeron*, 109 S.Ct. 939, 946-947, 103 L.Ed.2d 67, 78-79 (1989) (concurring in part). Statutes, not committee reports, go through the involved process of approval by both houses and the President. Nevertheless, that view has not yet garnered a majority, and so we must plunge into the murky waters of the legislative history. We find little light there, but what little there is reveals a seascape very different from the one painted by petitioner.

The original section 2244 was intended to make "no change in existing practice" according to a report written before *Price* v. *Johnston*, 334 U. S. 266 (1948). H. R. Rep. 308, 80th Cong., 1st Sess. A 178-179 (1947). When subdivision (b) was added in 1966, on the other hand, it was intended to make a substantial change in the law. "The purpose of these new subsections [(b) and (c)] is to add to section 2244 . . . provisions for a qualified application of res judicata." H. R. Rep. No. 1892, 89th Cong., 2d Sess., 8 (1966); "The bill seeks to alleviate the unnecessary burden [on federal courts] by introducing a greater degree of finality of judgments in habeas corpus proceedings." S. Rep. No. 1797, 89th Cong., 2d Sess. 2 (1966) ("1966 Senate Report").

If nothing else, these statements demonstrate an intent to reject the extreme statements in the case law that finality considerations have no weight in habeas corpus. See *Sanders* v. *United States*, 373 U. S. 1, 8 (1963); *Price* v. *Johnston*, *supra*, 334 U. S., at 289. Congress instead is in accord with Judge Friendly's later retort: The " 'policy against incarcerating or executing an innocent man' . . . shows only that 'conventional notions of finality' should not have *as much* place in criminal as in civil litigation, not that they should have *none*." Friendly, *supra* n. 3, 38 U. Chi. L. Rev., at 150 (emphasis in original).

The contention that Congress was simply codifying existing case law is untenable. The reports taken as a whole indicate an intent, indeed a determination, to make an affirmative change in the law in favor of finality.

Regrettably, the reports shed very little light on the precise contours of the intended change. Petitions "predicated on grounds obviously well known to [petitioners] when they filed the preceding application" are listed as *one example* of an abusive writ, 1966 Senate Report, at 2, but there is no exhaustive list. The report explicitly mentions "newly discovered evidence" but once again says that a writ based on such evidence need not be entertained if the prisoner "otherwise abused the writ" with no explanation of what that means. *Ibid.*

The argument has been made that Rule 9(b) of the Rules Governing Section 2254 Cases in the United States District Courts has frozen the *Sanders* "deliberate bypass" test into place and precluded further development of the case law. Such a drastic change in role of the Court in defining the scope of habeas corpus would probably be within the power of Congress, but it should not be inferred without compelling evidence.

Rule 9(b) as originally promulgated by this Court provided for dismissal of successive petitions alleging new grounds if the failure to assert them earlier "is not excusable." See 28 U. S. C. A. § 2254, Rule 9, at 1136 (1977). This language was attacked on two separate grounds. It is important to understand the difference in the two criticisms in order to evaluate the final product.

The National Association of Criminal Defense Lawyers, feared that the proposed language would codify the approach to procedural default in Justice Powell's concurrence in *Estelle* v. *Williams*, 425 U. S. 501, 513-515 (1976). *Habeas Corpus: Hearings on H. R. 15319 Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary*, 94th Cong., 2d

Sess. 15 (1976).[12] The NACDL endorsed instead language proposed by Professor Robert Clinton. He proposed that Congress amend the rule to allow dismissal of the second petition if

> "the judge finds that the failure of the petitioner is the result of the international relinquishment of a right or privilege known to the petitioner either prior to the time when the right or privilege should have been asserted at trial or prior to the filing of the previous petitions . . . . " *Id.*, at 25 (underlining in original).[13]

In other words, Professor Clinton proposed to Congress that it codify *Sanders* in its most liberal interpretation: applying the waiver standard of *Johnson* v. *Zerbst*, 304 U. S. 458, 464 (1938) to procedural defaults. 1976 Hearings, *supra* n. 12, at 24.

A different objection was voiced by those who believed that the question of the preclusive effect of prior petitions had no place in the rules at all. The ACLU statement, while agreeing with the NACDL, also indicated that the proposed change was in "the domain of substantive rights" and should "be adopted *only* by traditional legislative processes *or enunciated by the Supreme Court* in connection with an actual case or controversy." *Id.*, at 82 (second emphasis added).

Congress was thus presented with three alternatives. First, it could approve (or passively allow) a rule which some claimed would narrow the availability of habeas corpus. Second, it could freeze the case law at its high-water mark of *Fay* v. *Noia* and *Sanders*. Third, it could keep the question out of the rules and leave it to further statutory *and case law* development.

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12. Cited below as "1976 Hearings."

13. He also proposed that Congress abrogate *Francis* v. *Henderson*, *supra*, and codify *Fay* v. *Noia*, *supra*. *Ibid.*

The language actually adopted by Congress reads "the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ." Rules Governing Section 2254 Cases in the United States District Courts, Rule 9(b). Comparing this language with that of the statute ("deliberately withheld the newly asserted ground or otherwise abused the writ," 28 U. S. C. § 2244 (b)) leaves little doubt as to which path Congress chose.

Both the advisory committee language and the Clinton proposal were rejected. The language is neither a new, restrictive standard nor a ringing reaffirmation of the 1963 case law. Instead, it is analytically indistinguishable from the statutory language. The compromise result of the 1976 battle was a rule which changed nothing. Congress has enacted only a repetition of the statute's spacious and elastic phrase "abuse of the writ." Definition of the phrase was a judicial function before enactment of the rules, and it remains a judicial function afterward.

The final committee report on the rule is consistent with this interpretation. The report states that the " 'abuse of the writ' standard brings Rule 9(b) into conformity with existing law." H. R. Rep. No. 94-1471, reprinted in 1976 U. S. Code Cong. & Admin. News 2478, 2482. The authorities cited for "existing law" are section 2244(b) and a very limited quote from *Sanders* stating the "abuse of the writ" rule without elaboration. *Ibid.*

The distinction between freezing case law in place and allowing it to continue unimpeded is an important one. Both the language of the rule and the legislative history indicate that Congress intended not to interfere with judicial definition of "abuse of the writ" when it adopted Rule 9(b).

D. Conclusion.

There is nothing left of *Fay* v. *Noia* today. Its rendition of history has been branded as "revisionist." *Schneckloth* v. *Bustamonte*, 412 U. S. 218, 252 (1973) (Powell, J., concurring); see generally *Stone* v. *Powell*, 428 U. S. 465, 474-478 (1976).

Its "sweeping language" has been explicitly rejected. *Wainwright* v. *Sykes*, 433 U. S. 72, 87-88 (1977). Its "deliberate bypass" rule has been erased from the law of state procedural defaults and completely replaced by the cause and prejudice rule. The case is a dead letter.[14]

The *Sanders* dictum has thus hitched the law of abuse of the writ to a broken post. Congress has not seen fit to give any legislative definition whatever to the term. It is therefore incumbent upon the judiciary to define the term in a manner which appropriately balances the competing interests.

The answer, amicus submits, is to return to the principle announced in *Ex parte Cuddy*, 40 F. 62, 66 (1889) that the denial of a prior writ is generally a sufficient reason to deny a second or subsequent writ, absent facts which did not *exist* at the time of the first petition. This rule, however, needs to be tempered with the qualifications expressed in *Price* v. *Johnston*, 334 U. S. 266, 291 (1948), that there may be "adequate reasons" for not making an allegation earlier which make it "fair and just" to consider the subsequent petition, bearing in mind at all times that the purpose of habeas corpus is to prevent an actual miscarriage of justice, *ibid.*

The rules developed for procedural defaults meet all of these criteria. The cause and prejudice test with the miscarriage of justice exception accommodates all of the compelling arguments for considering second and subsequent petitions. Furthermore, by establishing a single standard for all defaulted claims it would bring a sorely needed consistency to a complex area of the law. The test "may lack a perfect historical pedigree," but it "provides a sound and workable means of channeling the discretion of federal courts." *Murray* v. *Carrier*, 477 U.S. 478, 496-497 (1986).

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14. Courts still cite *Fay* v. *Noia* as if it were still good authority, see, *e.g.*, J. A. 84, apparently because this Court has never used the word "overruled." An explicit acknowledgement that *Fay* v. *Noia* has, in fact, been overruled would help iron out inconsistencies in the case law.

III. Petitioner did not have adequate cause to omit his *Henry* claim from the first petition.

A detailed review of the facts of the case is beyond the scope of an amicus brief, and we will therefore not attempt one here. We will, however, venture a few observations on the application of the cause and prejudice test to the facts of this case.

Petitioner vigorously asserts that Evans' testimony was critical to the prosecution's case. Pet. Brief 55. This assertion leaves one wondering why Evans was not the focus of petitioner's post-conviction strategy from the very beginning, if his testimony were really that critical. Why was so much energy devoted instead to the abstract claim presented to this Court on the first round in *McCleskey* v. *Kemp*, 481 U. S. 279 (1987)? Why did defense counsel seek police records on that claim but not on Evans? See J. A. 61.

Where the testimony of a jailhouse informant is central to the case, a claim under *United States* v. *Henry*, 447 U. S. 264 (1980) is the obvious first place to look. When investigating a *Henry* claim, furthermore, the circumstances of how the informant came to be in the same cell or an adjoining cell would be among the first questions to be asked. There were written logs of cell assignments available at the time of the first petition, J. A. 129, n. 13, but it does not appear that any effort was made to obtain them. Even absent such records, the officer in charge of cell assignments would be the first person to ask. That person, apparently, was Officer Worthy, the officer now claimed to be a newly discovered witness. See J. A. 122.

It would appear that competent defense counsel placed the *Henry* claim on the "back burner" relative to other claims. That fact by itself is a good indication that the testimony in question was not of overwhelming importance. Cf. *Rose* v. *Lundy*, 455 U.S. 509, 543, n. 8 (1982) (Stevens, J., dissenting).

Cause for a procedural default generally requires "some objective factor external to the defense." *Murray* v. *Carrier*,

477 U. S. 478, 488 (1986). Petitioner asserts a "cover-up," Pet. Brief 12, claiming that the state suppressed a written statement by Offie Evans. Pet. Brief 50. State concealment of evidence is indeed "cause," *Amadeo* v. *Zant*, 486 U. S. 214 (1988), and if the present case were actually equivalent to *Amadeo*, that argument would be valid. This case, however, is quite different.

The State of Georgia commendably permitted defense counsel to take the deposition of the assistant district attorney in the state habeas proceeding. During that deposition, the prosecutor said: "Okay. When you referred to a statement, Offie Evans gave his statement but it was not introduced at the trial. It was part of that matter that was made in camera inspection by the judge prior to trial." J. A. 25.

For a statement to be inspected in camera it would have to be in writing or otherwise reduced to tangible form, such as a tape recording. The supposedly suppressed fact was thus stated by the state's attorney directly to the petitioner's attorney four months before the filing of the first federal petition.[15] Cover-ups should be made of sterner stuff. Cf. W. Shakespeare, *Julius Caesar*, act III, scene ii (1598). Defense counsel's assertion that he did not grasp the importance of what was said, J. A. 38, is not sufficient to convert an explicit disclosure into a cover-up. Counsel's failure to detect a claim is not "cause." See *Murray* v. *Carrier*, 477 U. S. 478, 492 (1986).

The absence of Evans' statement from the prosecutor's file does not constitute concealment. The defense had actual notice that the file was not complete. In court, under oath, and in present defense counsel's presence, former defense counsel testified that the prosecutor had told him that two items were missing, one of which was a statement. J. A. 24. The state's representation that it had provided a complete

15. The deposition is dated February 16, 1981. J. A. 25. The first federal petition was filed June 17, 1981. J. A. 64

copy of the prosecutor's file is not a representation that the file contains every relevant document. Petitioner's accusation that the state's "representation was false," Pet. Brief 10, n. 9, is unwarranted.

Petitioners showing falls far short of the kind of cover-up which constituted cause for default in *Amadeo*. At most, petitioner has shown a series of ambiguous statements reflecting confusion about what counsel was asking for. See Pet. Brief 8, n. 6. That confusion was due in large part to counsel's insistence that he was asking for statements *of the defendant*. See, *e.g.*, J. A. 17. A simple, straightforward request for statements *of the witness* would have clarified the situation, but none was made. Petitioner did not have cause to omit the claim from his first petition.

There has also been no fundamental miscarriage of justice in this case. Actual innocence is the touchstone of this narrow exception to the cause requirement. *Harris* v. *Reed*, 109 S. Ct. 1038, 1048, 103 L. Ed. 2d 308, 323 (1989) (O'Connor, J., concurring). To determine whether a genuine claim of actual innocence exists, all evidence should be considered, whether legally obtained or not. See Friendly, *supra* n. 3, at 160. The Court of Appeals found the evidence of guilt clear even without Evans' testimony. J. A. 135. With the Evans testimony and statement in addition, it would seem to be overwhelming.

The facts presented by petitioner in this case are facts which "might have been presented in the first instance." *Ex parte Cuddy*, 40 F. 62, 66 (1889). "[I]n such a case a second application should not be heard . . . ." *Ibid*. "The primary purpose of a habeas corpus proceeding," "to make certain that a man is not unjustly imprisoned," *Price* v. *Johnston*, 334 U.S. 266, 291 (1948), will not be impaired in the least by denial of this murderer's petition.

CONCLUSION

The decision of the Court of Appeals should be affirmed.

Dated: September, 1990

Respectfully submitted,

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